FILED

No. 961608 APR 10 1997

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term 1996

CLINTON TRIMIEW,

Petitioner,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SUPREME COURT OF VIRGINIA

Petition for Writ of Certiorari

Eddie W. Wilson, Esquire*
Richard N. Shapiro, Esquire
Francis P. Hajek, Esquire
John M. Cooper, Esquire
Counsel of Record
WILSON, HAJEK & SHAPIRO, P.C.
1294 Diamond Springs Road
Post Office Box 5369
Virginia Beach, Virginia 23471
(757) 460-7776

Counsel for the Petitioner

THE LEX GROUP • 1205 East Main Street • Suite 2 East • Richmond, VA 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3256

30 pp

QUESTIONS PRESENTED

I. DID THE VIRGINIA SUPREME COURT IMPROPERLY REVERSE THIS FELA JURY VERDICT BY FINDING THE WORKER GUILTY OF ASSUMING ROUTINE WORKPLACE RISKS IN VIOLATION OF 45 U.S.C. §54 AND THIS COURT'S CONTROLLING DECISIONS?

II. DID THE VIRGINIA SUPREME COURT MISAPPLY THE STANDARDS OF APPELLATE REVIEW AND MISINTERPRET THE RECORD TO REACH A RESULT INCONSISTENT WITH THE FEDERAL LAW GOVERNING CLAIMS BY INJURED RAILROAD WORKERS?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE 1

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 9

I. THE VIRGINIA SUPREME COURT IMPROPERLY REVERSED THIS FELA JURY VERDICT BY FINDING THE WORKER GUILTY OF ASSUMING RISKS IN VIOLATION OF 45 U.S.C. §54 AND THIS COURT'S CONTROLLING DECISIONS 9

(A) THE VIRGINIA SUPREME COURT GROUNDED ITS DECISION ON TRIMIEW'S ASSUMPTION OF RISK WHILE COUCHING ITS HOLDING IN TERMS OF "NON-NEGLIGENCE" OF NORFOLK SOUTHERN RAILWAY COMPANY 9

(B) THE RAILROAD IS NOT BEING PENALIZED FOR ROUTINELY MAINTAINING ITS TRACK, BUT RATHER FOR REQUIRING WORK "ON FOOT" ON HIGH LOOSE BALLAST WITHOUT WARNINGS, PRECAUTIONS OR INSTRUCTIONS 14

II. THE VIRGINIA SUPREME COURT MISAPPLIED THE STANDARDS OF APPELLATE REVIEW AND MISINTERPRETED THE RECORD TO REACH A RESULT INCONSISTENT WITH THE FEDERAL LAW GOVERNING CLAIMS BY INJURED RAILROAD WORKERS 17

(A) THE VIRGINIA SUPREME COURT INCORRECTLY APPLIED THE STANDARD OF EVIDENTIARY REVIEW TO A PLAINTIFF'S FELA VERDICT UPHELD BY A TRIAL COURT 17

(B) PLAINTIFF'S EVIDENCE REGARDING FAILURE TO TRAIN AND INSTRUCT WAS PROPERLY CONSIDERED BY THE JURY 19

CONCLUSION 22

TABLE OF AUTHORITIES

Page

CASES

Atchison, T & S.F.R. Co. v. Buell,
480 U.S. 557 (1987) 19

Atlantic Coast Line R. Co. v. Gunter,
229 F.2d 842 (5th Cir. 1956) 15

Atlantic Coast Line R. Co. v. Tiller,
142 F.2d 718 (4th Cir. 1944),
rev'd 323 U.S. 574 (1945) 10, 12

Dennis v. Denver and Rio Grande Western R.R. Co.,
375 U.S. 208 (1963) 17, 18

Gallick v. B & O Railroad Co.,
372 U.S. 108 (1963) 17, 18

Hahn v. Norfolk and W. Ry. Co.,
375 N.E.2d 914 (Ill. App. 1978) 15

Harp v. Illinois Central Gulf R.R. Co.,
370 N.E.2d 826 (Ill. App. 1977) 14, 15

Lavender v. Kurn,
327 U.S. 645 (1946) 17, 18

Norfolk Southern Railway Co. v. Trimiew,
253 Va. 22, 480 S.E.2d 105 (1997) .....passim

Tennant v. Peoria and P.U. Ry. Co.,
321 U.S. 35 (1944) 17, 18

Tiller v. Atlantic Coast Line R. Co.,
128 F.2d 420 (4th Cir. 1942),
rev'd 318 U.S. 54 (1943) 12

Tiller v. Atlantic Coast Line R. Co.,
318 U.S. 54 (1943) 1, 9, 10, 12, 18

Tiller v. Atlantic Coast Line R. Co.,
323 U.S. 574 (1945) 10

Union Pacific R.R. Co. v. Hadley, Ad'or,
246 U.S. 330 (1918) 20, 21

Urie v. Thompson,
337 U.S. 163 (1949) 14

UNITED STATES CONSTITUTION

Amendment VII 1, 17

STATUTES AND RULES

28 U.S.C. §1257(a) 1

45 U.S.C. §51 ..... 2, 4, 15

45 U.S.C. §54 ..... i, 1, 2, 9

Virginia Code §8.01-377 (1950, as amended) 4, 21

Virginia Supreme Court Rule 1:4 ..... 3, 19

Virginia Supreme Court Rule 3:16 ..... 3, 19

Virginia Supreme Court Rule 5:25 ..... 3, 21

OTHER

Richter and Forer, "Federal Employers' Liability Act,"
12 F.R.D. 13 (1951) 16

Random House Dictionary of the English Language,
2d Ed. (1987) 20

PETITION FOR WRIT OF CERTIORARI

Clinton Trimiew respectfully petitions the United States Supreme Court to issue a Writ of Certiorari to review a State Court decision which directly violates a central provision of the Federal Employers' Liability Act (hereafter "FELA"), 45 U.S.C. §54, as well as this Court's decisions related to application of this federal statute, including that in Tiller v. Atlantic Coast Line Railroad Company, 318 U.S. 54 (1943).

OPINIONS BELOW

The opinion of the Virginia Supreme Court, Norfolk Southern Railway Co. v. Trimiew, 253 Va. 22, 480 S.E.2d 104 (1997), is reprinted at Appendix pages 1-9. The order on the plaintiff's jury verdict is reprinted at Appendix pages 14-15, and the trial court's opinion from the bench denying Norfolk Southern Railway Company's motion for new trial and/or to set aside the verdict is reprinted at Appendix pages 11-13 (hereafter "App.").

JURISDICTION

The opinion of the Virginia Supreme Court, entered on January 10, 1997, decides an issue arising under the statutes of the United States. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

I. United States Constitution - Amendment VII

In suits at common law, where the value in controversy shall exceed Twenty Dollars ($20.00), the right

of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

II. 45 U.S.C. §51 - Liability of Common Carriers By Railroad ... for injuries to employees from negligence ... .

Every common carrier by railroad while engaging in commerce ..., shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce..., for such injury or death resulting in whole or in part from the negligence of...such carrier, or by reason of any defect or insufficiency, due to its negligence, in its...track, roadbed, ...or other equipment.

III. 45 U.S.C. §54 - Assumption of risks of employment.

In any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries..., such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents or employees of such carrier....

IV. **Virginia Supreme Court Rule 1:4 - General Provisions as to Pleadings.**

* * * * * * *

(d) Every pleading shall state the facts on which the party relies in numbered paragraphs, and it shall be sufficient if it clearly informs the opposite party of the true nature of the claim or defense.

* * * * * * *

V. **Virginia Supreme Court Rule 3:16 - General Provisions as to Pleadings.**

* * * * * * *

(b) An allegation of negligence...is sufficient without specifying the particulars of the negligence.

* * * * * * *

VI. **Virginia Supreme Court Rule 5:25 - Questions to be Considered.**

Error will not be sustained to any ruling of the trial court...for which the case was initially tried unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this court to attain the ends of justice.

* * * * * * *

VII. **Virginia Code §8.01-377 (1950, as amended) - Remedy when variance appears between evidence and allegations.**

If, at the trial of any action, there appears to be a variance between the evidence and the allegations or recitals, the court, if it considers that substantial justice will be promoted...may allow the pleadings to be amended,...as it may deem reasonable....

STATEMENT OF THE CASE

Procedural History

Clinton Trimiew (hereafter "Trimiew") filed this action against his employer, Norfolk Southern Railway Company (hereafter "the Railroad"), on February 27, 1995 in the Richmond Circuit Court in Richmond, Virginia. Trimiew's suit alleged the Railroad failed to provide him a safe place to work under 45 U.S.C. §51 (the FELA), and failed to warn him of certain dangers, among other allegations of negligence. [App. at 16-19]. On December 8, 1995, a jury awarded Trimiew a $500,000.00 verdict as a result of a workplace injury which had caused him painful back surgery, permanent disability, and rendered him unable to bend to tie his own shoes.

The Railroad claimed the verdict was excessive and that no negligence had been shown in its post-trial motion.[1] The trial court denied the Railroad's post-verdict motions on December 19, 1995.

---

[1] Negligence evidence was solid enough that defendant never moved for summary judgment pre-trial, nor moved to strike the evidence as insufficient at the close of plaintiff's evidence or at the close of all the evidence at trial. The first challenge was raised after the adverse verdict.

The Railroad appealed to the Virginia Supreme Court (hereafter "VSC") which accepted the appeal solely on the question of the sufficiency of evidence of negligence. On January 10, 1997, the VSC's opinion re-examined the evidence and held that both the trial court and jury were in error because the evidence of the Railroad's negligence was insufficient to support the verdict in the VSC's estimation. The VSC reversed the jury's verdict and ordered final judgment for the Railroad.

Trimiew's Statement of Facts

On August 20, 1993, Trimiew, a railroad laborer, suffered serious injury on the job as he dismounted from a vehicle, called a "high rail" truck, which runs down the tracks of the railroad. [App. at 76-77, 84, 172]. He was working with his supervisor, Robert Forsythe, doing general maintenance of the railroad near Burkeville, Virginia. [App. at 86]. As Trimiew got out of the vehicle he was caused to fall by the movement of high mounds of ungroomed ballast rock onto which he had to step down. [App. at 88-89].

The ballast causing the fall was at or above the level of the rails on which the train runs, whereas the standard, usual level of such ballast was flat and level with the wooden railroad cross-ties. [App. at 90-95, 173]. Trimiew presented a diagram of the height of the ballast showing that it reached at least the height of the rail. [App. at 90, 170]. This formed a mound or berm of stone. [App. at 95-96]. Mounds of this height were not present at the few other locations where Trimiew and Forsythe stopped earlier the same day. [App. at 86]. Gang supervisor Stephen Palmer admitted that he knew there was "high ballast" in the area that Trimiew fell [App. at 118], and that it could have contributed to causing Trimiew's fall. [App. at 118]. The appearance of the ballast "looked safe" at the accident site but was ungroomed and loose,

rolling out from under Trimiew "like marbles." [App. at 88, 95].

The purpose of ballast rock is to give lateral support to the track and promote drainage. [App. at 39, 169]. It was well known to the Railroad that it was safer and easier for its workers to walk on flat and firm rock surfaces along the margin of its tracks than through high and loose mounds of such rock. [App. at 41, 45, 115, 135-36]. The Railroad foremen testified that normally the ballast lining the track margins was level with the wooden cross-tie, going outward six inches beyond the outside of the cross-tie, at which point the ballast rock normally sloped downward. [App. at 39-40]. Because high, loose, and ungroomed ballast is a well known danger, the Railroad had adopted detailed standard written procedures relating to unloading, grooming and maintaining same. [App. at 39-40, 115, 168, 169-70]. From the diagrams accompanying these written procedures, the standard profile for ballast in places such as where this accident occurred is level with the wooden cross-ties, not at or higher than the level of the rail on which the trains run. [App. at 115, 169-70].

This standard flat condition of the ballast could be deviated from to meet the goal of unloading the ballast before new cross-ties are unloaded as part of a T&S (timber and surfacing) project to repair the track. [App. at 39-40]. T&S operations to replace the cross-ties are relatively infrequent, only scheduled every eight (8) years on this track. [App. at 127-28]. Even when ballast trains dumped fresh ballast, company standards directed that the mounds be clear of rail switches and road crossings. [App. at 37, 168]. Normally, the loose freshly dumped ballast is returned to standard condition by a T&S crew within a month of unloading. [App. at 59].

These high mounds of ballast lining the track margins had been placed in anticipation of a T&S operation around March 1993, about five months before the injury, and had

not been maintained, used, or disturbed since. [App. at 34-35, 37-39]. Workers testified that the ballast dumping work in March 1993 was "unusual" because the ballast rock in the cars was frozen solid. [App. at 34-37]. Ernest Jones, foreman of the gang, testified that the fifty-four hopper car train should have spread stone over eight to twelve miles, but only spread the stone over a compressed five to six mile stretch of track, because of the frozen chucks, creating even higher than usual mounds. [App. at 57-59]. The result was that the Railroad left "big piles here, big piles there." [App. at 36].

Supervisor Palmer learned by April or May 1993 that the T&S operation, which was to use the dumped ballast, was cancelled altogether due to budget cutbacks. [App. at 116]. In fact, the Railroad knew in April of 1993 that the T&S crew was postponed for at least a year. [App. at 116]. The mounds of rock were allowed to remain beside this particular section of the railroad track for months, permitting the danger to be present at the time of Trimiew's injury on August 20, 1993.

A ballast regulator, used to flatten, groom, and tamp the rocks, or to plow the ballast back up into a mound, was located on a rail "side track" about three miles away from the Milepost 89 accident location. [App. at 32-33, 171]. Supervisor Forsythe admitted that the ballast regulator located on the side track could have been used to smooth the ballast rock where Trimiew fell. [App. at 138-39]. Two of the Railroad's ballast regulator operators testified it would take a single worker four to five hours to smooth or groom the entire five miles of ballast rock mounds surrounding Burkeville. [App. at 52, 65].[2]

---

[2] In the Railroad's closing jury argument as well as in its oral argument to the VSC, the Railroad asserted that if such a ballast regulator smoothed or groomed the five miles of rock, that an entirely new ballast train and a mechanized T&S gang would be required to re-dump the rock at a later date. The VSC referred to this argument, never distinguishing

Plaintiff's suit also included the allegation at paragraph seven (7) that "defendant failed to inspect, find, and warn plaintiff of a dangerous condition; that defendant and its agents failed to issue appropriate warnings, violated their own standards as to the proper grooming and placement of ballast rock along the railroad line....[which caused Trimiew's] injuries." [App. at 17-18]. The first evidence presented by Trimiew at trial was two admissions by the Railroad as follows:

> That [the Railroad] admits that [the Railroad] maintains no written records, or written safety rule, which specifies how a worker's arms and legs are to be positioned prior to exiting from the cab of a "high rail" vehicle.
>
> That [the Railroad] has no written memoranda or documents which were distributed to, or conveyed to [Trimiew], detailing the manner in which [Trimiew] was required to dismount from the cab of a "high rail" vehicle, such as the one involved in the subject accident.

[App. at 23-24]. Trimiew's immediate supervisor admitted that the area where Trimiew was caused to fall was not an area that was walked by workers often, [App. at 139] and he and Trimiew had never together worked on foot at that exact

---

that there was no evidence to support it. See 253 Va. at 28-29, 480 S.E.2d 109 (1997). This argument was inaccurate and likely was rejected by the jury which understood that the same ballast regulator machine that normally grooms the rock could plow the rock back up to its original location with a single worker on a four to five hour work assignment. In fact, the testimony on the point confirmed that the side arms or plows of the regulator can push the ballast away from the rail or pull it back up as needed. [App. at 32].

location before the date. [App. at 140]. Trimiew and his supervisor typically inspected 100 miles of track, [App. at 25, 82] and the high mounds extended over 5-6 miles only. [App. at 58-59]. There was no testimony that Trimiew was specifically warned on the day in question (or before) about the danger of loose and high ballast near Burkeville. The Railroad had never trained or instructed Trimiew how to dismount from the "high rail" vehicle, or into ungroomed mounds of rock. [App. at 23-24, 111-114].

REASONS FOR GRANTING THE WRIT

I. THE VIRGINIA SUPREME COURT MPROPERLY REVERSED THIS FELA JURY VERDICT BY FINDING THE WORKER GUILTY OF ASSUMING RISKS IN VIOLATION OF 45 U.S.C. §54 AND THIS COURT'S CONTROLLING DECISIONS.

(A) THE VIRGINIA SUPREME COURT GROUNDED ITS DECISION ON TRIMIEW'S ASSUMPTION OF RISK WHILE COUCHING ITS HOLDING IN TERMS OF "NON-NEGLIGENCE" OF NORFOLK SOUTHERN RAILWAY COMPANY.

In 1939, Congress abolished assumption of risk under the FELA. 45 U.S.C. §54. Barely four years later, in Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 58 (1943) (hereafter "Tiller I"), this Court clarified that "every vestige of the doctrine of assumption of risk was obliterated from the law by the 1939 amendment." The Court of Appeals had found the evidence insufficient to establish negligence, saying that the doctrine of assumption of the risk still applied, not as a defense, but to show non-negligence related

to "ordinary risks." Id. at 57. Reversing that ruling, this Court stated that Congress, by abolishing the defense of assumption of risk (the common law doctrine that the worker bore the risk of all dangers "normally and necessarily incident to his employment") did not mean to leave open the identical defense for the master by changing its name to "non-negligence." 318 U.S. at 56, 58.

On remand, the Fourth Circuit Court again tried to prevent a recovery claiming that no negligence was shown because the accident happened under circumstances not against railroad customs and rules, and because the circumstances had existed before and were known to the employee. Tiller v. Atlantic Coast Line R. Co., 323 U.S. 574, 580 (1945) (hereafter "Tiller II"). However, while relying on the ordinariness of the danger and the familiarity of the circumstances to the employee to deny his claim of negligence, the Fourth Circuit Court carefully avoided relying on "assumption of the risk." See Atlantic Coast Line R. Co. v. Tiller, 142 F.2d 718, 722-23 (4th Cir. 1944). This Court again reversed the Fourth Circuit Court's failure to allow the jury to decide whether the circumstances constituted a violation of a railroad's broad duty to inspect the workplace for hazards and to warn workers of same. Tiller II, 323 U.S. at 580. This Court confirmed that the duty to warn may apply even if no railroad rule or custom prohibited the action or condition from occurring, and even if the worker is generally familiar with the dangerous condition from prior work activities. Id. In short, the Tiller line of cases stands for the concept that the Railroad has a duty to take reasonable steps to react to and to warn of even customary dangers.

Ignoring both statutory and decisional law, the VSC in this matter claimed that no negligence was proved because the condition causing the injury, ungroomed mounds of ballast rock lining roadbed walking areas, was "normal" and was familiar to workers like Trimiew from earlier work

activities. Norfolk Southern Railway Co. v. Trimiew, 253 Va. 22, 28-29, 480 S.E.2d 104, 108-09 (1997). The VSC interjected the abolished assumption of the risk issues into this case to substitute its judgment for the jury's verdict. The VSC's analysis was that because something is a customary danger, known to an employee, then there is no longer a duty of the railroad to warn about it or remove it.

The VSC included this key language in its holding:

> [T]he record is devoid of proof, lay or expert, that there was anything improper in the manner the ungroomed ballast was situated along the track..... [T]he ballast where plaintiff fell was at the normal height for ungroomed ballast..... [W]orkers like this plaintiff were fully aware of the normal condition of ungroomed ballast from long railroad experience and from participating in unloading the very ballast upon which the plaintiff fell; they knew that ungroomed ballast was "difficult" to walk upon. Thus, given these facts, there was no basis for the defendant to perceive that the ballast, laid in routine fashion for miles along the track in open country, posed an unreasonable danger to employees such as this plaintiff.

253 Va. at 28-29, 480 S.E.2d at 108-09 (emphasis added).

In so holding, the VSC ignored the evidence the jury heard. First, the jury may have reasonably determined that: it was negligence to simply dump the rock and to require Trimiew to do his regular work in the ungroomed rock, without having been warned or instructed. Perhaps the jury concluded the Railroad should have placed temporary warning signs along the five miles of track; or supervisor Forsythe should have warned Trimiew as he stopped the

"high rail" truck, or the Railroad should have used the ballast regulator machine for the four to five hour assignment to groom the ballast back to standard height, or the railroad should have instructed Trimiew about how to dismount from the vehicle in mounds of ballast rock. Thus, the danger posed by high, loose stone is the type of danger that could be avoided under the circumstances. See Tiller I, 318 U.S. at 72 (Frankfurter, J. concurring).

When this court reversed the Fourth Circuit Court of Appeals in Tiller I, the discredited Fourth Circuit decision contained a factual analysis remarkably similar to that of the VSC:

> Tiller had been in the employ of the railroad company for sixteen years, and was familiar with the layout of the tracks...and with the operation of the cars and the make-up of the trains. It follows that the case presents no exception to the rule concerning the duty of railroad employees and freight yards to look out for their own safety....

128 F.2d at 421-22. Likewise, the second overturned Fourth Circuit opinion in the Tiller line has language very similar to the VSC's here ("the same movement [as that causing Tiller's death] had been performed...on other occasions and...the track was in general use"). Tiller II, 142 F.2d at 722-23.

In grounding its decision on the concept of assumption of risk, the VSC, just as in the Fourth Circuit's second Tiller decision, camouflaged its decision under the guise of "non-negligence" of the railroad. However, this Court obliterated every vestige of assumption of risk over fifty years ago and rejected court efforts to mask a holding in terms of "non-negligence." Here, the Railroad had long standing knowledge of the danger of ungroomed ballast,

generally, and these mounds specifically. Instead of accepting that this evidence showed the extent of the Railroad's negligence, the VSC assumed that this same evidence supported a finding of "non-negligence" because the danger was one regularly created. This is the essence of "assumption of risk."

Even though it was conceded by the Railroad that ungroomed rock was a known difficult walking surface, the VSC tried to liken high ungroomed ballast rock to a "normal condition" and "a known condition," and then even suggested that the Railroad could never spread ballast for "fear of being found liable for an employee's injuries." Trimiew, 253 Va. at 28-29, 480 S.E.2d at 108-09. The evidence showed this was a danger, and not the usual condition of the ballast and track, even if the danger was periodically present. There was testimony that this was a particularly unusual frozen unloading, that was only supposed to be present for a short time, until the T&S crew smoothed it. The jury could find it was not an everyday situation and was unexpected to Trimiew.

The true standard under the FELA is whether a reasonably safe work place was provided, and under familiar principles the Railroad had a duty to inspect and warn plaintiff of even accustomed dangers. The VSC interpretation of a railroad's duties purports to apply to any "routine maintenance operation" and turns the FELA's mandates nearly upside down. Every day of the year, thousands of railroad maintenance workers in the United States are doing "routine maintenance," and many of these routine activities are dangerous. The VSC's decision would mean railroads are free from FELA liability, even the duty to warn, if these jobs involve routine and accustomed dangers.

(B) THE RAILROAD IS NOT BEING PENALIZED FOR ROUTINELY MAINTAINING ITS TRACK, BUT RATHER FOR REQUIRING WORK "ON FOOT" ON HIGH LOOSE BALLAST WITHOUT WARNINGS, PRECAUTIONS OR INSTRUCTIONS.

Trimiew had a duty to prove a dangerous condition and he did so, which was never really contested by the Railroad. Notice was not an issue since the Railroad actually created the dangerous walking surface in March, 1993. See Harp v. Illinois Central Gulf R.R. Co., 370 N.E.2d 826, 828 (Ill. App. 1977) (where railroad created the dangerous condition it is charged with actual knowledge). The Railroad's duty to inspect and warn under the FELA is well settled, and Trimiew proved notice and a failure to warn him of the long known condition. Despite the strong evidence, the VSC was on a clear "search to reverse" mission and did not meaningfully acknowledge that FELA is a broad remedial statute, under which this court has adopted a "standard of liberal construction in order to accomplish [Congress'] objects." Urie v. Thompson, 337 U.S. 163, 180 (1949).

Rather than applying the broad remedial principles underlying FELA, the VSC closely affiliated itself with a railroad's "fear" of conducting a "routine maintenance project" without being held liable by an injured worker. See Trimiew, 253 Va. at 29, 480 S.E.2d at 109. Not only is this far afield from proper appellate review of the facts of this particular case, it totally misconstrues the issue of negligence. The Railroad was not required to have Trimiew work in the five miles of ungroomed ballast--it had a choice to close that section to general "walking" maintenance work until the section was groomed by rail machinery.

By its express terms, the FELA, 45 U.S.C. §51, extends a railroad's potential negligence liability to "any defect or insufficiency" in its "track" or "roadbed," in no manner delineating between open country, rail yards or remote locations. Indeed, ungroomed ballast has often been the basis of FELA liability. In Atlantic Coast Line R.R. Co. v. Gunter, 229 F.2d 842 (5th Cir. 1956), the railroad had dumped ballast between ties and had not tamped or leveled same. The plaintiff rail switchman was performing his usual duties when he was injured due to the loose and rolling ballast rock. 229 F.2d at 843. In Gunter, as in this case, the railroad denied any negligence and asserted it was simply maintaining its track in accordance with good engineering practices. The Fifth Circuit declared:

> It is true enough that the evidence establishes that there was nothing wrong in ballasting the roadbed for use as main line tracks...but it is also true that this portion of the track was still being used as a part of the yard, and switching operations were going on over it, operations which require the switchmen to alight from moving trains and obligating the company to use reasonable care to furnish a reasonably safe footing for such alighting.

Id. at 844. Accordingly, the Fifth Circuit affirmed a jury verdict for the plaintiff. Id; see also Hahn v. Norfolk and W. Ry. Co., 375 N.E.2d 914 (Ill. App. 1978) (Worker slipped on loose ballast, jury verdict affirmed); Harp, 370 N.E.2d 826 (Court affirmed plaintiff's jury verdict for a rail worker who slipped on loose and unpacked ballast which looked secure before plaintiff fell).

In FELA cases "there has been an oscillation between the intent of the statute to impose such [broad and remedial] responsibility and the determination of a portion of the

judiciary to resist such imposition of liability on the outmoded argument that industry needs such protection to help it grow. Today American industry is full grown and should assume the cost of the human overhead as part of its adult responsibility." Richter and Forer, "Federal Employers' Liability Act," 12 F.R.D. 13, 35 (1951). Of course, rail workers injured or disabled on the job do not receive any wages or workers' compensation under the FELA unless some fault is proven, and this underlies the remedial purposes of the statute.

Thus, the Railroad is not in danger of being liable for all ungroomed ballast falls, nor all routine maintenance injuries, only those that under the totality of the circumstances should have been prevented by ordinary care. However, if the mistaken logic of the VSC is allowed to stand, no fall on ungroomed ballast could ever give rise to liability no matter how egregious the railroad's negligence in failing to warn or remove the danger.

II. THE VIRGINIA SUPREME COURT MISAPPLIED THE STANDARDS OF APPELLATE REVIEW AND MISINTERPRETED THE RECORD TO REACH A RESULT INCONSISTENT WITH THE FEDERAL LAW GOVERNING CLAIMS BY INJURED RAILROAD WORKERS.

(A) THE VIRGINIA SUPREME COURT INCORRECTLY APPLIED THE STANDARD OF EVIDENTIARY REVIEW TO A PLAINTIFF'S FELA VERDICT UPHELD BY A TRIAL COURT.

The difference between "search to reverse" appellate review and "seek to uphold" review is rather obvious. In FELA actions, this court has repeatedly held that only when there is a complete absence of probative facts to support the conclusion reached by the jury does reversible error appear. Dennis v. Denver and Rio Grande Western R.R. Co., 375 U.S. 208, 210 (1963) (per curiam); Lavender v. Kurn, 327 U.S. 645, 653 (1946). In the interest of preserving the U.S. Constitution's Seventh Amendment right to trial by jury, there inheres the general rule that the court should reconcile the jury's verdict if at all possible. Gallick v. B & O Railroad Co., 372 U.S. 108, 119 (1963). Once it is shown that railroad negligence played any part, even the slightest, in producing the injury, a jury verdict for the worker may not be upset on the basis of his own negligence, no matter how substantial it may have been, although the jury may, of course, take the employee's contributory negligence into account in arriving at its verdict. Dennis, supra, 375 U.S. at 210. Courts are not free to re-weigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable. Tennant v. Peoria and P.U. Ry. Co., 321 U.S. 35 (1944). It is an undue

invasion of the jury's function for an appellate court to weigh conflicting evidence and witness credibility and arrive at a conclusion opposite from one reached by the jury. Lavender, 327 U.S. at 652-53; Tiller I, 318 U.S. at 67-68.

The VSC ignored the mandates of Dennis, Lavender, Tennant and Gallick, as outlined. There was no effort to reconcile or uphold. Trimiew's evidence of the Railroad's negligence was sufficient, and in many instances not even contested. The existence of ungroomed ballast is a known danger because it is difficult to walk on safely. The Railroad did not take reasonable steps to warn to prevent the injury. It failed to post warnings, bulletins or signs about the ungroomed ballast. The Railroad also could have instructed and warned Trimiew about dismounting into such dangerous conditions, which were not a familiar part of his general workday practices, as ballast train dumping occurred in advance of T&S gang work on a stretch of track only once every several years.

It could have taken further steps to prevent the injury, such as to have prohibited workers from dismounting for "on foot" tasks in the ungroomed ballast, or to have more promptly smoothed and groomed the ballast with a four to five hour work assignment. Denying the Railroad's motion for a new trial which claimed that "no negligence had been shown," the trial court succinctly stated as follows:

> [The negligence is a] combination of both putting the ballast down, leaving it in an unsafe condition no matter how long...[and] requiring Mr. Trimiew to do his job on that ballast....[a] hazardous condition created by the railroad.

[App. at 12].

Such basic proof of a danger, and negligence in reaction to same, was clear in the record, especially when all facts, and reasonable inferences therefrom, are looked at in the light most favorable to the plaintiff. It is hard to understand how the seven justices of the VSC could have concluded that the seven citizens of Richmond, Virginia all had no reasonable basis whatsoever for the verdict resulting from their deliberations.

(B) PLAINTIFF'S EVIDENCE REGARDING FAILURE TO TRAIN AND INSTRUCT WAS PROPERLY CONSIDERED BY THE JURY.

The VSC concluded that Trimiew never properly alleged or presented a theory of negligence that the Railroad failed to instruct him about the dangers of dismounting from a "high rail" vehicle into ungroomed ballast. The VSC erroneously states that "plaintiff did not present this theory of negligence at trial; there was no such allegation in the motion for judgment and there was no instruction that would have allowed the jury to make a finding against the defendant on this subject." Trimiew, 253 Va. at 29.

First, Trimiew fairly alleged failure to instruct by implication and inference from his general allegations of failure to warn and failure to provide a safe workplace. Virginia is a notice pleading state. VSC Rule 1:4 only requires a plain and simple statement of the claim.[3] Virginia's pleading rules and the FELA impose no duty on a plaintiff rail worker to set out all relevant facts in the complaint. Atchison, T & S.F.R. Co. v. Buell, 480 U.S. 557 (1987). Moreover, VSC Rule 3:16 provides that a

---

[3] See infra, at 9, Statutes and Constitutional Provisions Involved In This Case section.

negligence allegation need not include any particulars of the negligence. Trimiew's suit, at paragraph seven (7), sufficiently asserted that the defendant "failed to provide plaintiff with a safe place to work...failed to inspect, find and warn plaintiff of a dangerous condition...failed to issue appropriate warnings, [and] violated [its] own standards as to the proper grooming and placement of ballast rock...." [App. at 17-18].

A failure to "warn" by logical implication includes a general failure to "instruct." To "warn" is to admonish or exhort as to action or conduct, to notify, advise or inform...to give authoritative or formal notice.... See Random House Dictionary of the English Language, 2d. Ed. (1987). The same dictionary defines "instruct" as "to furnish with information;...inform or apprise..." and defines "instruction" as the "act of furnishing with authoritative directions." Id. To apply a normal and intended meaning to a "warning" would, at the minimum, include "to instruct."

At trial Trimiew presented evidence of the failure to prevent the injury by advising and instructing him of the danger. [App. at 23-24, 111-14]. Trimiew also responded to defenses, such as contributory negligence, raised at trial, with evidence of inadequate training and instruction. [App. at 111-14]. If the general evidence serves dual "offensive" and "defensive" roles, then the "whole ball of wax" goes to the jury, where no objection to such evidence is made by the defendant and a general negligence instruction is provided. Cf. Union Pacific R.R. Co. v. Hadley, Ad'or, 246 U.S. 330, 332-33 (1918) (Holmes, J.) (Court may be justified in leaving general questions to the jury and not take the bundle apart and break the sticks separately). In fact, both Trimiew and the Railroad argued in closing arguments about training and instruction. [App. at 141-42, 145, 148-49]. No particularized negligence allegation instructions were presented to the jury, but rather general negligence instructions were granted. [App. at 161]. Further, a railroad

cannot force the worker to have the jury instructed on each constituent allegation of negligence, as opposed to a general negligence charge. See Hadley, 246 U.S. 330. Here, the trial court properly charged the jury on Trimiew's "safe place to work" allegations as well as with a general failure to "inspect" and take "precautions" instruction. [App. at 161].

Most importantly, the Railroad never objected to evidence or argument about these various negligence theories in closing argument, in the jury instructions, or at anytime during trial. The Railroad never even raised this issue on appeal to the VSC. The first claim that training or instruction was not properly presented to the jury was sua sponte by the VSC. The VSC cited no case to support its judgment that "training and instruction" was not valid evidence to support Trimiew's proof that the Railroad failed to provide a reasonably safe place to work, or of the Railroad's failure to warn Trimiew of the dangers along the track.

If this evidence was "improper," the Railroad was required to object at trial. Trimiew would have moved to amend his pleadings to conform to the evidence pursuant to Va. Code § 8.01-377. (See infra, at 9, Statutes and Constitutional Provisions Involved In This Case section). As there was no objection from the Railroad at any time, it is too late for this issue to serve as any basis for the Railroad to assert error or for the VSC to claim the evidence was not properly before the jury.[4]

---

[4] The VSC's own Rule 5:25 requires that error not be assigned which is raised the first time on appeal. The Railroad's Petition for Appeal "Assignments of Error" to the VSC only asserted a lack of the Railroad's negligence and an excessive verdict. [App. at 174]. The appeal was accepted only on the issue of primary negligence of the Railroad.

CONCLUSION

Trimiew moves this Court to accept his Petition and Writ, and to summarily reverse and reinstate the jury verdict of the Richmond Circuit Court. The VSC's opinion is grounded on an improper and unlawful application of the doctrine of assumption of risk, which has been wholly obliterated under the FELA, as well as improper appellate review of a plaintiff's FELA verdict upheld by a trial court.

DATED this 8th day of April, 1997.

CLINTON TRIMIEW

By: _____
Of Counsel

Eddie W. Wilson, Esquire*
Francis P. Hajek, Esquire
Richard N. Shapiro, Esquire
John M. Cooper, Esquire
* *Counsel of Record*
WILSON, HAJEK & SHAPIRO, P.C.
1294 Diamond Springs Road
Post Office Box 5369
Virginia Beach, Virginia 23471
(757) 460-7776
Counsel for Petitioner

(2) 961608 APR 10 1997

No. _____

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term 1996

CLINTON TRIMIEW,

Petitioner,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SUPREME COURT OF VIRGINIA

Appendix to Petition for Writ of Certiorari

Eddie W. Wilson, Esquire*
Richard N. Shapiro, Esquire
Francis P. Hajek, Esquire
John M. Cooper, Esquire
Counsel of Record
WILSON, HAJEK & SHAPIRO, P.C.
1294 Diamond Springs Road
Post Office Box 5369
Virginia Beach, Virginia 23471
(757) 460-7776

Counsel for the Petitioner

THE LEX GROUP • 1205 East Main Street • Suite 2 East • Richmond, VA 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3256

180 pp

TABLE OF CONTENTS

Appendix Page

Opinions and Orders

Opinion,
Supreme Court of Virginia
entered January 10, 1997 ..... A-1

Order Denying Motion
to Reconsider and
Set Aside the Verdict,
Circuit Court of the
City of Richmond
entered January 17, 1996 ..... A-10

Transcript of Post-Verdict
Bench Opinion of
The Honorable Randall G. Johnson,
Circuit Court of the
City of Richmond
taken on December 19, 1995 ..... A-11

Order Regarding Verdict,
Circuit Court of the
City of Richmond
entered December 11, 1995 ..... A-14

Appendix Page

Trimiew's Initial Pleading

Motion for Judgment,
Circuit Court of the
City of Richmond
filed February 27, 1995 ..... A-16

Pre-Trial and Incidents of Trial

Excerpts from Transcript of
Pre-Trial Proceedings before
The Honorable R. G. Johnson,
Circuit Court of the
City of Richmond
taken on December 7, 1995..... A-20

Excerpts from Transcript of
Trial Proceedings before
The Honorable R. G. Johnson,
Circuit Court of the
City of Richmond
taken on December 7, 1995 ..... A-23

Appendix Page

Pre-Trial and Incidents of Trial (continued):

Excerpts from Transcript of
Trial Proceedings before
The Honorable R. G. Johnson,
Circuit Court of the
City of Richmond
taken on December 8, 1995 ..... A-122

Excerpts from Trimiew's
Closing Argument
taken on December 8, 1995 ..... A-141

Excerpts from Norfolk Southern
Railway's Closing Arguments
taken on December 8, 1995 ..... A-142

Excerpts from Trimiew's
Rebuttal Closing Argument
taken on December 8, 1995 ..... A-147

Jury Instructions,
Circuit Court of the
City of Richmond
introduced on December 8, 1995 ..... A-156

Appendix Page

Pre-Trial and Incidents of Trial (continued):

Trimiew's Exhibit No. 18:
Norfolk Southern Railway
MW&S Standard Procedure 020
regarding Ballast: Use,
Unloading and Reporting (Excerpt) A-168

Trimiew's Exhibit No. 16:
Norfolk Southern Railway
MW&S Standard Procedure 390
regarding Maintaining
Track Stability (Excerpt) A-169

Procedure 390: Diagram A-170

Trimiew's Exhibit No. 10:
Ballast Mounds Diagram A-170

Trimiew's Exhibit No. 4:
Ballast Regulator Machine A-171

Trimiew's Exhibit No. 2:
High Rail Truck A-172

Appendix Page

Pre-Trial and Incidents of Trial (continued):

Trimiew's Exhibit No. 7:
Photo of Track Area A-173

Appeal - Assignments of Error

Norfolk Southern Railway's
Assignments of Error to the
Supreme Court of Virginia
filed March 11, 1996 ..... A-174

VIRGINIA:

FROM THE CIRCUIT COURT OF
THE CITY OF RICHMOND
Randall G. Johnson, Judge

Present: All the Justices

NORFOLK SOUTHERN RAILWAY COMPANY

v.

CLINTON TRIMIEW

OPINION BY JUSTICE A. CHRISTIAN COMPTON

Record No. 960533

Entered: January 10, 1997

On August 20, 1993, appellee Clinton Trimiew, the Plaintiff below, was injured while working for appellant Norfolk Southern Railway Company, the defendant below, near Burkeville in Nottoway County. The plaintiff brought this action against defendant under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 et seq., to recover damages for his injuries.

The plaintiff alleged that he was injured during "his attempt to alight and exit from the passenger side cab of a high rail vehicle which ran along the railroad track." He asserted that "[u]pon alighting from the vehicle, he suddenly slipped on excessively high and ungroomed ballast rock which lined the track area just outside his vehicle." He alleged the defendant negligently failed to provide him a safe place to work, negligently "failed to inspect, find, and warn Plaintiff of a dangerous condition," and violated its "own

standards as to the proper grooming and placement of ballast rock along the railroad line prior to Plaintiff's accident."

In a grounds of defense, the defendant denied the allegations of primary negligence, alleged the plaintiff's injuries were caused solely by his own negligence, and asserted the plaintiff was guilty of contributory negligence.

The case was submitted to a jury during a two-day trial in December 1995 upon the issues of primary and contributory negligence, proximate cause, and damages. The defendant did not move to strike the plaintiff's evidence either at the conclusion of the plaintiff's case-in-chief or at the close of all the evidence. The jury found in favor of the plaintiff and fixed the damages at $500,000.

Following announcement of the verdict, the defendant moved the court to set the verdict aside upon the ground that the plaintiff had failed to prove the defendant was negligent. See Gabbard v. Knight, 202 Va. 40, 43, 116 S.E.2d 73, 75 (1960) (in testing sufficiency of evidence, defendant has option of making a motion to strike the plaintiff's evidence or awaiting the jury's verdict).

The trial court denied the motion and entered judgment on the verdict. We awarded the defendant this appeal, limited to consideration of whether the trial court erred in denying defendant's motion to set aside the verdict and in ruling the evidence was sufficient to present a jury issue upon the question of defendant's negligence.

Recently, we summarized the settled principles applicable to cases of this type. We apply federal decisional law, because whether negligence has been established for purposes of the FELA is a federal question. Drawing on federal law, we have noted that a plaintiff's proof must justify with reason the conclusion that an employer's negligence played any part, even the slightest, in producing the injury for which damages are sought. Norfolk and W. Ry. Co. v. Johnson, 251 Va. 37, 43, 465 S.E.2d 800, 805 (1996). Reasonable foreseeability of harm is an essential

ingredient of FELA negligence. Id. at 43-44, 465 S.E.2d at 805. Ordinarily, the issue of FELA negligence is a question of fact to be decided by the jury. Norfolk and W. Ry. Co. v. Hodges, 248 Va. 254, 260, 448 S.E.2d 592, 595 (1994). However, in the rare case when fair-minded persons cannot differ on whether the employer was at fault and whether that fault played any part in the employee's injury, the question becomes one for the court. Stover v. Norfolk and W. Ry. Co., 249 Va. 192, 199, 455 S.E.2d 238, 242, cert. denied, ___ U.S. ___, 116 S.Ct. 186 (1995).

Under the FELA, an employer has a nondelegable, continuing duty to exercise reasonable care in furnishing its employees a safe place to work. Johnson, 251 Va. at 44, 465 S.E.2d at 805. The employer must conduct proper inspections to discover dangers in places where employees are required to work, and must take reasonable precautions for the employees' safety after determining the existence of such dangers. Id. But even under the FELA, an employee still must establish that the employer was guilty of some act of negligence in order to recover. Norfolk and W. Ry. Co. v. Hughes, 247 Va. 113, 116, 439 S.E.2d 411, 413, cert. denied, ___ U.S. ___, 114 S.Ct. 2136 (1994).

Examining the facts of this case against the background of the foregoing principles, we hold the evidence was insufficient as a matter of law to raise a jury issue upon the question of defendant's negligence.

Rules of appellate procedure require us to consider the facts, some of which are disputed, in the light most favorable to the plaintiff, who is here armed with a jury verdict confirmed by the trial judge. During daylight hours in August 1993, the plaintiff was riding in the passenger seat of the cab of a "high rail" vehicle operated by Robert Forsythe on defendant's track. They were inspecting the track near Burkeville. The plaintiff, employed by defendant for 20 years, was a track laborer. Forsythe was one of defendant's assistant track supervisors. A high rail vehicle is

"just a regular truck" that has the capability of being operated on a highway or a railroad track.

Forsythe stopped the vehicle to cut bushes near the track. He alighted from the vehicle's left side and the plaintiff, after putting on his hard hat and gloves, began to alight from the right side, apparently to assist Forsythe in clearing the bushes. According to the plaintiff, the ground where he was to step from the vehicle "looked safe to get out." Holding to the vehicle for support, the plaintiff then stepped on ballast rock lying along the track. He testified that as he stepped down, the "ballast just went from under me, like, if you were to step on a pile of marbles." The plaintiff "landed down" in an adjacent ditch and felt "something pop" in his back.

Ballast, in this context, is stone laid on the roadbed of a railroad track for the purpose of stabil zing the track and facilitating drainage. According to defendant's written standard procedures on the use of ballast, its purpose is "to provide adequate drainage and afford a means of maintaining proper cross level, surface, and alignment for the track under load." The stone is commonly known as "2 inch ballast" or "3/4 inch ballast."

Ballast is unloaded from the sides of a slowly moving, multi-car train. A "berm" of ballast is laid beside the track and outboard of the "head" of cross-ties supporting the track. After laying, the berm generally is eight to twelve inches above the top of the rail. When ballast is piled to this level, "it makes for a difficult walking surface." These mounds of ballast are smoothed and "groomed" by a machine called a "ballast regulator." When groomed, the ballast supporting a level track is even with the level of the cross-tie for six inches and then slopes downward away from the cross-tie.

The evidence showed that railroads periodically must replace old cross-ties and resurface sections of track. This is called a "timbering and surfacing" (T & S) operation. Before

a scheduled T & S operation, ballast that will be used in the project is unloaded. The piles of rock are left in an ungroomed condition until the old ties are replaced during the T & S operation, after which the ballast is groomed to the prescribed profile.

In the present case, ballast was unloaded in March 1993 along a stretch of track that included the site of the plaintiff's fall, which occurred about five months later. The dumping of the rock was described as "unusual" because it was frozen and did not flow smoothly from the ballast train. The ballast came out "in chunks" and piled up along the rails, leaving "big piles here, big piles there," according to one witness.

The unloading was in advance of a T & S operation scheduled for the summer of 1993. Because of "budget reasons," the T & S operation was postponed until "the next year, or possibly the year after that." Thus, the ballast remained as it was dumped along the track up to the time of plaintiff's fall.

The plaintiff's evidence showed that an operational ballast regulator owned by defendant was stored on a railroad sidetrack about three miles away from the site of this accident and that employees of defendant qualified to operate the machine were available. Two witnesses who had operated a ballast regulator in the past testified that it would take four to five hours to "smooth out" the approximately five or six miles of ballast that had been dumped in March. Additionally, the plaintiff's evidence showed that a timbering and surfacing "gang" was "usually" scheduled within one to three months of dumping to "come through to smooth the ballast."

The plaintiff participated in the March unloading project and had passed the area where he fell on work days prior to the day of the accident. He testified he knew "ballast was in that general area," but that he "had never stopped" there before the day he fell.

On appeal, the plaintiff contends the trial court correctly refused to set the verdict aside because the plaintiff "proved multiple theories of negligence." Initially, the plaintiff argues that his immediate supervisor, Forsythe, "failed to warn him that there were unusually high mounds of ballast rock in the area where the supervisor chose to stop the high rail vehicle." Continuing, he says that even though he participated in the March ballast dumping operation, "it should be remembered that he worked along 105 miles of track, and that he often worked in the area of crossings or rail switches," areas where the evidence showed "the ballast train had not dumped unusually high mounds of ballast." He notes that because assumption of risk has been abolished under the FELA, 45 U.S.C. § 54, "the railroad cannot be exonerated from liability simply because Trimiew participated in dumping the stone five months earlier."

In addition, the plaintiff argues that because defendant knew the T & S gang would not come through Burkeville at all during 1993 and because it was aware of the danger of the unusually high mounds, it was incumbent upon defendant to groom the ballast promptly. According to the plaintiff, "the preventive measure to correct the dangerous condition was so simple, a four or five hour work assignment, . . . there was plainly a basis for the jury to determine that the railroad was negligent in failing to assign a worker to operate this ballast regulator to smooth the ballast mounds."

Also, the plaintiff contends defendant should have trained him "about dismounting from a high rail vehicle into unusually high mounds of loose ballast." The evidence showed that, prior to plaintiff's fall, defendant maintained no written safety rule or informed the plaintiff about "how a worker's arms and legs are to be positioned prior to exiting from the cab of a high rail vehicle."

We reject each of the plaintiff's "multiple theories of negligence." The FELA "does not make the railroad an

absolute insurer against personal injury damages suffered by its employees." Wilkerson v. McCarthy, 336 U.S. 53, 61 (1949). And, under the FELA, the weight of the evidence must exceed a scintilla before the case properly may be left to the jury's discretion. Stover, 249 Va. at 200, 455 S.E.2d at 243 (citing Brady v. Southern Ry. Co., 320 U.S. 476, 479 (1943)). If, without weighing the credibility of the witnesses, the evidence supports "but one reasonable conclusion as to the verdict," the court should decide the matter, thus saving the result "from the mischance of speculation over legally unfounded claims." Stover, 249 Va. at 200, 455 S.E.2d at 243 (quoting Brady, 320 U.S. at 479-80) (internal quotations omitted).

In the present case, the record is devoid of proof, lay or expert, that there was anything improper in the manner the ungroomed ballast was situated along the track. In his argument, the plaintiff dwells on the erroneous conclusions that the ungroomed ballast was "excessively high" and "dangerous." All the evidence was to the contrary; the ballast where plaintiff fell was at the normal height for ungroomed ballast. The berm is generally eight to twelve inches above the top of the rail on each side of the track, and that was the condition, according to all the evidence, that existed at the point of plaintiff's accident.

There was no proof that the plaintiff fell on any of the previously frozen "chunks" or lumps of stone discharged during the March unloading. Indeed, the plaintiff submitted as evidence photographs he had taken of the "exact area" of his fall, and these photos do not show ballast lying in "chunks" or lumps; they merely show a smooth, constant mound of ballast piled along the rails.

Workers like this plaintiff were fully aware of the normal condition of ungroomed ballast from long railroad experience and from participating in unloading the very ballast upon which the plaintiff fell; they knew that ungroomed ballast was "difficult" to walk upon. Thus, given

these facts, there was no basis for the defendant to foresee that the ballast, laid in routine fashion for miles along track in open country, posed an unreasonable danger to employees such as this plaintiff.

Because the berm of ballast lay in a normal condition, the length of time the rock remained ungroomed becomes irrelevant upon the question of any alleged negligence charged to the railroad for failing to timely groom the rock with a ballast regulator. The ungroomed ballast where plaintiff fell, according to the uncontradicted evidence, was in the same condition and degree of stability the day after it was spread as it was five months later on the day of the accident. As the defendant argues, under the plaintiff's theory the railroad should have scheduled a special operation to groom the ballast when the original T & S operation was postponed, and then repeated the entire ballast unloading process when the T & S operation was rescheduled. To find that the railroad owes a duty to its employees under these circumstances to regulate ungroomed ballast, a known condition, in a specified period of time is to reach the unreasonable conclusion that the railroad may never spread ballast in anticipation of a T & S operation for fear of being found liable for an employee's injuries sustained during a perfectly routine maintenance project.

There are a number of reported cases decided in other jurisdictions under the FELA involving falls by railroad workers on ballast, none of which is persuasive because they are factually inapposite to this case. See generally, e.g., Atl. Coast Line R.R. Co. v. Gunter, 229 F.2d 842 (5th Cir. 1956); Seaboard Air Line R.R. Co. v. Gentry, 46 So.2d 485 (Fla. 1950); Hahn v. Norfolk and W. Ry. Co., 375 N.E.2d 914 (Ill. App. 1978); Harp v. Illinois Cent. Gulf R.R. Co., 370 N.E.2d 826 (Ill. App. 1977).

Finally, the plaintiff complains on appeal of the failure of the defendant to instruct him or provide written rules about the safe method of dismounting a high rail

vehicle. The plaintiff did not present this theory of negligence at trial; there was no such allegation in the motion for judgment and there was no instruction that would have allowed the jury to make a finding against the defendant on this subject. As a matter of fact, plaintiff's failure to properly dismount the vehicle was an issue raised by the defendant and presumably was considered by the jury on the contributory negligence question. Thus, we shall not discuss the issue further.

Accordingly, we hold that the trial court erred in denying the defendant's motion to set the verdict aside. Thus, we will reverse the judgment for the plaintiff and enter final judgment here in favor of the defendant.

Reversed and final judgment.

VIRGINIA:

IN THE CIRCUIT COURT OF
THE CITY OF RICHMOND

CLINTON TRIMIEW,
Plaintiff,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Defendant.

AT LAW NO. 95-A-520-3

ORDER

Entered: January 17, 1996

This matter came before the Court on defendant's Motion for Reconsideration and Motion and Memorandum to Set Aside the Verdict or for Remittitur, in which defendant asked the Court to reconsider and/or set aside the entry of the Court's Order of December 11, 1995 regarding the jury's verdict in this cause. The Court heard oral argument of counsel for both parties in this cause on December 19, 1995, and hereby

DENIES the motion for reconsideration and/or to set aside the verdict or enter a remittitur in this cause for the reasons as stated in open Court.

ENTER: 1/17/96

/s/
Judge

VIRGINIA:

IN THE CIRCUIT COURT OF
THE CITY OF RICHMOND

CLINTON TRIMIEW
Plaintiff,

vs.

NORFOLK SOUTHERN RAILWAY
Defendant.

Taken on: December 19, 1995

Complete transcript of the testimony and other incidents of the MOTIONS in the above-styled matter, when heard on the 19th day of December, 1995, before the Honorable Randall G. Johnson, Judge.

THE COURT: All right. We're here again on the case of Trimiew versus Norfolk Southern.

Mr. Kozak, this is your motion to set aside?

* * *

[Attorney Argument Omitted]

THE COURT: Obviously, a Railroad has to put down ballast until railroads find some other ways of -- I always thought it was cushioning the track, but, apparently, it's not. It's to stop the track from moving around. So putting the ballast down is not negligence.

The question or the question that I guess that Mr. Shapiro or One of the questions that he raises is whether leaving it there for a long period of time is negligence. I'm not very comfortable by saying that leaving it there for any

particular amount of time is negligence, because I don't know where to cut that off. If the-- If the Plaintiff had fallen down a day after the accident, was that negligence if he had fallen down a month later or two months later? I'm not sure that there is any cut off period, and I am not sure it is appropriate just to give that question to the jury to let the jury decide how long is too long. That may be appropriate in the appropriate case. I'm not sure this is that case.

It seems to me, though, that the real question in this case is not just putting the ballast down, but what did the Railroad require Mr. Trimiew to do after it put the ballast down. Again, if Mr. Trimiew just wanted to stretch his legs or saw a friend standing next to the track and just wanted to get down and go talk to his friend, I think you might have a different situation. It seems the Plaintiff would be hard pressed to cite any negligence on the part of the Railroad. The Railroad put the ballast down. Mr. Trimiew knew that the ballast was piled. If it was in an unsafe manner, he knew that it was in an unsafe manner, because he knew it was there when it was put down but, then, also, to require him to perform his services, once the ballast was put down I think that's the negligence. A combination of both putting the ballast down, leaving it in an unsafe condition no matter how long, but while that's happening, while that condition is in existence, requiring Mr. Trimiew to do his job on that ballast, and Mr. Trimiew had a choice to make. He could either do what he was told to do by his supervisor or not to do it. I think he did what you expect workers to do. He obeyed the orders of his supervisor. In doing so, he exposed himself to the hazardous condition created by the Railroad. That became a jury question, then, to determine the negligence of the Railroad and Mr. Trimiew's negligence as being an FDLA [sic] case. Mr. Trimiew's negligence did not bar his recovery. That issue was presented to the jury. The jury spoke to that issue, and the Court is not inclined to set that verdict aside.

With regard to the amount of damages, there was more than sufficient evidence, in the Court's opinion, to support the particular amounts of damages in this case, particularly with respect to the lost wages, I think was more than sufficient to support the half million dollar verdict. It sounds high, but, in light of the amount of lost wages that the Plaintiff proved or at least presented to the jury, the Court does not believe that that is too high and certainly doesn't shock the conscience of the Court, which is the standard.

So, again, I think that the Plaintiff did carry its burden of proving or at least putting on enough evidence to present the question of the Railroad's negligence to the jury. I think that question is properly presented to the jury along with the question of Mr. Trimiew's contributory negligence. So the Motion to Set Aside, Motion to Reconsider the Court's order refusing to set aside the verdict will be denied.

Mr. Shapiro, will you prepare the order on that?

* * *

VIRGINIA:

IN THE CIRCUIT COURT OF
THE CITY OF RICHMOND,
JOHN MARSHALL COURTS BUILDING

CLINTON TRIMIEW
Plaintiff,

v.

NORFOLK SOUTHERN RAILWAY COMPANY
Defendant.

LA-520

ORDER

Entered: December 11, 1995

On December 8, 1995, again came the parties, in person and by counsel, and also the jury pursuant to its adjournment of yesterday.

The evidence of the defendant was presented.

After receiving instructions from the Court and hearing arguments of counsel, the jury retired to their room to consult of their verdict and after some time returned into Court with the following verdict:

> We, the jury, on the issues joined, find in favor of the plaintiff and assess his damages at $500,000.00.
>
> Carol A. Nitz
> Foreman/Forelady

The defendant by counsel moved to set aside the verdict for reasons stated in the record, which motion was overruled and to which action of the Court counsel for the defendant objected.

It is, therefore, ORDERED that plaintiff recover and have judgment against the defendant in the amount of $500.00.00, with interest thereon at the rate of 9% per year from the date of judgment until paid, and the costs.

A copy of this order was this day mailed to counsel of record.

ENTER 12/11/95

/s/ _____
Judge

VIRGINIA:

IN THE CIRCUIT COURT OF
THE CITY OF RICHMOND

CLINTON TRIMIEW,
Plaintiff,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Defendant.

Serve: Wiley F. Mitchell, Jr.
Registered Agent
Norfolk Southern Building
Three Commercial Place
Norfolk, Virginia 23510

Defendant

MOTION FOR JUDGMENT

Filed: February 27, 1995

Plaintiff, Clinton Trimiew, by counsel, moves this Court for a judgment and an award of execution against Defendant, Norfolk Southern Railway Company, by reason of the following:

1. Defendant is a railroad corporation organized and existing under and by virtue of the laws of the Commonwealth of Virginia, and was, at all times mentioned herein doing business within the jurisdiction of this Court as a common carrier of intrastate and interstate commerce.

2. Venue lies in this Court as Defendant regularly conducts and solicits business in the City of

Richmond, and the Plaintiff resides within the City of Richmond.

3. Plaintiff's action arises under 45 U.S.C. Sections 51-60, commonly known as the Federal Employers' Liability Act, and 45 U.S.C. Sections 1-16, commonly known as the Safety Appliance Act, and 45 U.S.C., Section 23, commonly known as the Boiler Inspection Act.

4. At all relevant times, Defendant was an intrastate and interstate carrier, and was engaged in interstate transportation and commerce. At the time of his injury, Plaintiff was working in furtherance of interstate commerce and participating in work which directly, closely and substantially affected the general interstate commerce carried on by Defendant.

5. On or about August 20, 1993, Plaintiff was an employee of Defendant, and on or about said date, while so employed in the regular course of his duties at or near Burkeville, Virginia, Plaintiff was injured while performing such duties, which involved his attempt to alight and exit from the passenger side cab of a high rail vehicle which ran along the railroad track. Upon alighting from the vehicle, he suddenly slipped on excessively high and ungroomed ballast rock which lined the track area just outside his vehicle.

6. Plaintiff's initial medical treatment was received at St. Mary's Hospital within the City of Richmond, within this District and Division.

7. Plaintiff alleges that, in violation of the Federal Employers' Liability Act, Defendant failed to provide Plaintiff with a safe place to work and safe equipment with which to work; that Defendant failed to inspect, find, and warn Plaintiff of a dangerous condition; that Defendant and its agents failed to issue appropriate warnings, violated their own standards as to the proper grooming and placement of ballast rock along the railroad line prior to Plaintiff's accident; and that as a result of this negligence and carelessness on the part of Defendant and its

agents, Plaintiff was caused to suffer severe and permanent injuries.

8. The Defendant failed to comply with 45 U.S.C. Sections 51-60, commonly known as the Federal Employers' Liability Act.

9. Plaintiff alleges that, in violation of the Safety Appliance Act, Defendant failed to provide Plaintiff with a safe place to work and safe equipment with which to work as to the high rail vehicle which operated along the railroad line and had certain coupling mechanisms to allow it to push or pull other track equipment; that Defendant failed to inspect, find, and warn Plaintiff of a dangerous condition; that Defendant and its agents failed to issue appropriate warnings prior to Plaintiff's accident; that Defendant failed to install accessible handholds on the interior or exterior of said vehicle; and that as a result of the aforesaid carelessness and negligence of Defendant, Plaintiff was caused to suffer severe and permanent injuries.

10. The Defendant failed to comply with 45 U.S.C. Sections 1-16, commonly known as the Safety Appliance Act.

11. Plaintiff alleges that, in violation of the Boiler Inspection Act, Defendant failed to provide Plaintiff with a safe place to work and safe equipment with which to work; that Defendant failed to inspect, find and warn Plaintiff of a dangerous condition; that Defendant and its agents failed to issue appropriate warnings prior to Plaintiff's accident; and that as a result of this negligence and carelessness on the part of Defendant and its agents, Plaintiff was caused to suffer severe and permanent injuries.

12. The Defendant failed to comply with 45 U.S.C. Section 23, commonly known as the Boiler Inspection Act.

13. As a result of the accident, Plaintiff was caused to lose, and will in the future be caused to lose, income which he otherwise would have earned.

14. As a result of the accident, Plaintiff was caused to suffer, and will in the future be caused to suffer, great physical pain and mental anguish.

15. As a result of the accident, Plaintiff was caused to expend, and he will in the future be caused to expend, large sums of money for medical expenses, and has suffered through surgical procedures and has permanent scarring and impairment as a result of the subject incident.

16. As a result of the accident, Plaintiff was caused to be unable, and will in the future be unable, to perform his necessary and lawful affairs.

Plaintiff DEMANDS A TRIAL BY JURY and prays for judgment against the Defendant in the sum of Eight Hundred Thousand Dollars ($800,000.00), and his costs expended.

CLINTON TRIMIEW

By: /s
Of Counsel

Richard N. Shapiro, Esquire
WILSON & HAJEK, P.C.
Post Office Box 5369
Virginia Beach, VA 23455
(804) 460-7776

VIRGINIA:

IN THE CIRCUIT COURT OF
THE CITY OF RICHMOND

JOHN MARSHALL COURTS BUILDING

CLINTON TRIMIEW,
Plaintiff,

VS.

NORFOLK-SOUTHERN RAILWAY, CO.
Defendant.

CASE NO. LA-520

Taken on: December 7, 1995

Transcript of motions and arguments prior to trial, when heard on December 7, 1995, before the Honorable R. G. Johnson, Judge.

* * *

THE COURT: This is Trimiew versus Norfolk-Southern. There are some in limine motions, I believe, on both parties....

* * *

MR. KOZAK: The two main ones, then, is the first one. The -- and this involves evidence concerning other claims from workers slipping on ballast.

The plaintiff has an Interrogatory and a Request for Admissions to produce records that they have had other slips and falls.

And the railroad did generate a computer list of a hundred and thirty-six incidents within the past five years, the five years before this accident.

THE COURT: Do you plan to present that evidence?

* * *

MR. SHAPIRO: Yes. But, I told Mr. Kozak that all I want to use is the Interrogatory and his answer.

* * *

THE COURT: Is any part of your defense going to be that you didn't know that this ballast might cause injuries?

MR. KOZAK: No, Judge. The testimony is going to be that everybody out there knew that the ballast had been piled high. It had not been regulated and it was difficult to walk on.

* * *

MR. SHAPIRO: The relevance is that all of them involved falls -- workers falling on ballast. And it goes to the issue of notice and knowledge of the railroad that this is dangerous --

THE COURT: Yes.

MR. SHAPIRO: Particularly it's a danger. And I think it goes to the issue of the railroads -- we have the duty to prove that the railroad has violated a standard of duty for leaving that ballast ungroomed for five months....

* * *

THE COURT: With regard to the defendant's in limine motion, evidence of other injuries are not relevant to this case.

* * *

VIRGINIA.

IN THE CIRCUIT COURT OF
THE CITY OF RICHMOND

JOHN MARSHALL COURTS BUILDING

CLINTON TRIMIEW,
Plaintiff,

VS.

NORFOLK-SOUTHERN RAILWAY, CO.
Defendant.

CASE NO. LA-520

Taken on: December 7, 1995

Complete transcript of testimony and other incidents in the above, when heard on December 7, 1995, before the Honorable R. G. Johnson, with a jury.

Tr.92

All right, Mr. Shapiro.

MR. SHAPIRO: From the first supplemental request for admissions, number 11 read:

"That defendant admits that defendant maintains no written records, or written safety rule, which specifies how a worker's arms and legs are to be positioned prior to exiting from the cab of a high rail vehicle." The response is "admitted."

Number 12. "Admit that defendant has no written memoranda or documents which were distributed to, or

conveyed to the plaintiff, detailing the manner in which plaintiff was required to dismount from the cab of a high rail vehicle, such as the one involved in the subject accident." Response, "admitted."

THE COURT: All right. Now, your first witness is Mr. McGinley?

MR. SHAPIRO: Yes. Mr. McGinley.

Tr.93

THE COURT: Mr. McGinley, would you come to the witness stand, please.

THE BAILIFF: Would you raise your right hand and face the Judge.

CARL CLAYTON MCGINLEY, JUNIOR, a witness having been called upon by the plaintiff, and having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. SHAPIRO:

Q Could you please state your full name, sir, for the Court and jury.

A Carl Clayton McGinley, Junior.

Q And what is your home address, Mr. McGinley?

A 213 Garnet's Way, Suffolk, Virginia.

THE COURT: Just pretend that the microphone is not there. You have a good strong voice.

Tr.94

MR. SHAPIRO: You're coming through.

BY MR. SHAPIRO:

Q What is your position? Are you employed by the Norfolk-Southern Railway Company?

A Yes, I am.

Q And what is your position with the railway company?

A Foreman. Right now.

Q How long have you been a foreman with the Norfolk-Southern, Mr. McGinley?

A Off and on, since '89.

Q Since 1989. And are you here today under a subpoena that we issued on behalf of Mr. Trimiew?

A Yes, I am.

Q And you work out of the Richmond, Virginia area, is that correct?

A Correct. That's correct.

Q And is that the Richmond District, as they call it?

A Well, it would be Virginia Division. The Virginia Division.

Q All right.

Tr.95

A It's in Richmond.

Q What area do you cover in your work?

A Burkeville to West Point.

Q All right. And Richmond falls in the middle of those two points?

A Right.

Q And about how many miles of track does your gang work over?

A About a hundred.

Q When did you first know Mr. Trimiew?

A I met Mr. Trimiew when I came to Richmond to work.

Q Was it before you became a foreman?

A Yes.

Q Was it during the '80s, sometime?

A First time I met him, it was in the '80s. I don't know when, but --

Q How many men do you supervise, as a foreman?

A Let's see. Most times it's four. But it varies. It cuts down to two, four, five.

Q All right. During --

Tr.96

A Somewhere in there.

Q During a portion of the time in 1993, say from January through August, were you the foreman over any gang?

A No, I weren't.

Q Who was the foreman up until say -- up until March of 1993?

A I believe it was Ernest Jones, but I don't remember.

Q And after March of '93, you became the foreman?

A After Jones got -- yeah. Whatever time it was.

Q So, sometime in 1993, but before Mr. Trimiew's accident in August you were foreman?

A Yes. Yes. I believe I was.

Q What type of work did your gang do, in general terms, up and down the railroad track?

A Repair the track. Whatever needed to be done. Repair the track.

Q Did you and your men work off of a certain kind of a truck?

A We work out of a gang truck.

Q Describe for the jury a gang

Tr.97

truck, would you?

A Okay. It's a boom truck. How would I explain it?

Q Does it have a cab in the front?

A It's got, of course, the cab in the front. It's just a regular truck where you carry people in the back. They can sit on a long bench. They are just sitting in there. Just a regular cab truck. This truck runs on the rail.

Q So, it was a high rail; it has high rail capabilities?

A It has high rail capabilities, plus a boom. We have a boom on the back, so we can --

Q And is there a way to get up on to the bed, or the rear of the truck? Are there steps getting up to the rear of the truck?

A There's, normally, some steps in the back.

Q All right. Who was your supervisor, during that period of time, from -- in 1993?

A Steve Palmer.

Tr.98

Q And what's his title with the railroad, or what was his title, at that time?

A Track supervisor.

Q What is the track supervisor's responsibilities, as you understood them?

A To make sure that we do our jobs. And to help us in any way we need help.

Q Who makes work assignments for the gang to go out and do work everyday?

A Track supervisor.

Q All right. If Mr. Palmer was not around --

THE COURT: Excuse me one second. Do we need the easel any more?

MR. SHAPIRO: I'm probably going to use it with one other thing, Your Honor.

THE COURT: Okay. Let's move it until you need it.

MR. SHAPIRO: Okay.

BY MR. SHAPIRO:

Q When Mr. Palmer was not in Richmond, or was not working, who was the supervisor; or who is the next in line, as far as supervision?

Tr.99

A Bob Forsythe.

Q And who is Mr. Forsythe?

A He's the assistant track supervisor.

Q And was he a track inspector and rode in a different truck and inspected track?

A Yes. He was track inspector.

Q What type of position did Mr. Trimiew have in 1993?

A He rode a high rail inspection truck.

Q Was he a laborer?

A Yes.

Q What other gang members were there in 1993 that you supervised, after you became foreman around March?

A What other gang members?

Q Yes.

A You want names of the people I worked with?

Q Yes, sir.

A Linwood Ferebee. I have to thnk [sic] about it. Now, let's see.

Q I'll suggest a few.
A Joe Wynn.

Tr.100

Q Okay.
Q Curtis Folks?
A Curtis Folks. Yeah, he's still there.
Q And --
A In '93.
Q And up until March, who was the foreman, again, of '93?
Was it Ernest Jones?
A Ernest Jones. He was, yeah.
Q And was Mr. Forsythe the track inspector, between points of time in 1990 and 1993?
A Yes, he was.
Q What does the assistant track inspector do? You mentioned what you did with your gang. What's the job of the assistant track inspector?
A He checks the track and makes sure that it's rotable. I mean, make sure there's no broken rails, no broken joints, no trees hanging down. Make sure the rail is viable for the train to go by.
Q Are they supposed to look for any

Tr.101

unsafe conditions?
A Unsafe conditions. Yes.
Q All right. Let me show you some photographs, Mr. McGinley, and ask you if you recognize this truck.
MR. SHAPIRO: May I approach the witness, Your Honor?

BY MR. SHAPIRO:

A Yes, sir, that's the picture of a gang truck -- inspection truck.

Q Is that the high rail truck that Mr. Forsythe and Trimiew used during 1993?

A Yeah, it looks like it.

Q Same type?

A Same type, yeah. A bread truck.

Q Do you have a nickname for that type of vehicle?

A We call it -- I don't know. High rail, bread truck, whatever you want to call it. Inspection truck.

MR. SHAPIRO: I'd move to introduce those.

THE COURT: Any objections, Mr. Kozak?

MR. KOZAK: No, Your Honor.

Tr.102

THE COURT: They will be admitted as Plaintiff's Exhibits 1 through 3.

NOTE: The above-referred-to photographs were marked and filed as Plaintiff's Exhibits Nos. 1 through 3.

BY MR. SHAPIRO:

Q Mr. McGinley, do you recognize what this is? Does this appear to be a blow up of one of the --

A Yeah. That's the same picture I saw over there.

Q Okay. Did you ever ride in this bread truck, or high rail truck yourself --

A Yes, I did.

Q -- before August of 1993, from time-to-time?

A I'm sure. I mean, I rode it from time-to-time. I don't remember the dates.

Q Okay. Did you learn in August 1993 that Mr. Trimiew suffered an injury at work?

A If that was the date. I remember. I know I heard something about it.

Tr.103

Q You were not working right with him, at that time, were you?

A No, he was with the inspection truck.

Q Were you told the vicinity, or what milepost he had been hurt?

A Not at the time. Not that I recall. I think he said Burkeville, but I'm not sure.

Q Around Burkeville? Okay. What is ballast rock, generally? Is it just a rock that lines the railroad track?

A Ballast rock is what we put out to stabilize the track. It's to keep it from moving so much. Ballast rock is just rock. I mean that's it; three inches.

Q Is there any particular railroad machine that runs along the rail that's designed to smooth or plow ballast rock?

A Yeah. There's a ballast regulator.

Q So, do those appear familiar to

Tr.104

you?

A Yes, sir. They look like ballast regulators.

Q All right.

MR. SHAPIRO: I'd moved to introduce those.

THE COURT: Any objection, Mr. Kozak?

MR. KOZAK: No, Your Honor.

THE COURT: They will be admitted as four and five.

NOTE: The above-referred-to photographs were marked and filed as Plaintiff's Exhibits Nos. 4 through 5.

BY MR. SHAPIRO:

Q Have you seen ballast regulators a lot of times during your career on the railroad?

A A lot of times. Yeah. About -- I guess about 10 years, you know, I seen them all over.

Q How long have you worked the railroad, did I ask you?

A 20 years.

Tr.105

Q 20 years. How does a ballast regulator machine work? You've operated one yourself, haven't you?

A It's just the wing comes out and you just regulate ballast. You drop it down on to the head of the ballast, or whatever, and you regulate it to where you want to get it; a nice flow of ballast.

Q Well, what does it have, a plow on each side?

A Plow in the front, broom in the back. And the arms drop on the side there to pull in or push out rocks; whichever way you want it.

Q You say you've operated a regulator before?

A Yes, I have.

Q Was there a ballast regulator kept or stored anywhere around Burkeville, Virginia as of the summer of 1993?

A We had a ballast regulator.

Q Where was it kept?

A Where was it kept?

Q Was it in a sidetrack near Burkeville?

Tr.106

A It could have been. I think it was up there in Burkeville, up there near the sidetrack. I'm not --

Q And if Mr. Trimiew's accident happened at the 89 milepost, how far would that sidetrack be, approximately, from where that is, in miles?

A Oh, that's three miles.

Q And you operated that ballast regulator from time-to-time that was over there, didn't you?

A Yes, I did.

Q Who gave you work assignments to --

A Steve Palmer.

Q And he would tell you where he wanted you to go to work on the regulator?

A Yes.

Q Were there any other members of the gang that were qualified or knew how to use that ballast regulator machine when you were there in 1993, in the summer?

A Linwood Ferebee could run it.

Q Okay. And who else? Anyone?

A And Curtis Folks. He probably

Tr.107

could run it.

Q And from time-to-time did Mr. Palmer call on them to run that regulator?

A Called mostly on Ferebee. Yes. Called Ferebee mostly to run it. Yeah.

Q Mr. McGinley, what is a timber and surfacing gang? Could you just briefly describe to the jury what that gang does?

A Mostly they just put in cross ties. The ties you see on the tracks, they install the ties on the tracks. They

take out the old ties and put in the new ties. And then dust it up behind them.

Q Just roughly, how many different types of machines, besides -- including ballast regulators and other machines, does a T and S gang have a long a stretch of track?

A Well, you got -- you start off with a ballast regulator. You knock the rock down that we already dumped, to sweep away for the spike pullers. The spike pullers come by and pull the spikes. Then you got people that come by

Tr.108

with plate jacks; lift up the rail to get the plates off. Then you got a tie sorter. He comes by and kicks the ties out and puts new ties out.

Q You mean takes the entire wooden cross ties out and puts a new tie in?

A Well, before that you got a tie handler. He's spotting the ties so they would have -- when they come up to a place, all they got to do is grab a tie, pull it in underneath the tracks.

Q Now, you didn't work on a T and S gang during 1993, right?

A Right, I was with --

Q You were with the track maintenance truck?

A Right.

Q So, let's go back to March of 1993. Did you participate in a ballast dumping operation, where a train came in and dumped ballast rock?

A Yes, we dumped ballast.

Q And where did you dump ballast rock; where was that?

Tr.109

A Burkeville. It was from -- we started at the -- I believe we were backed up to the 84, and went to -- 84 to about five miles.

Q About five miles?

A About five miles. Five or six miles.

Q But, was it somewhere in that vicinity of Burkeville, Virginia.

A Yes.

THE COURT: You don't need that again.

A Yes.

THE COURT: We've seen it.

A Yes.

BY MR. SHAPIRO:

Q And did it continue past the 89 milepost, where the ballast was dumped?

A Oh, yes. Yes. Yeah, we --

Q Okay. Did the members of your gang all assist with dumping that ballast out from the ballast train?

A Yeah. That was a hard day.

Q And what was unusual about that day, that the ballast was being dumped --

A It was frozen.

Tr.110

Q -- in 1993?

A The ballast was frozen.

Q Was it a cold day?

A It had icicles hanging from the cars. And it was kind of cold.

Q But, you guys were out there trying to unload it from what? Are there shoots on the bottom of the car doors for the rock to go through?

A Right. You're opening up a door on the side. The ballast pours out as you're walking a long. It's supposed to pour out, but that --

Q What happened that day?

A It didn't pour out. We had to take a hammer and beat it and run with the train.

Q Well, why didn't the rock pour out when the door was open?

A It was frozen.

Q It was frozen solid?

A Yeah. Pretty good frozen.

Q Did you have to do anything unusual in the way the ballast doors were opened on that day, because of the frozen rock?

Tr.111

A Well, yeah. Like I said, we had to beat it with sticks and bars, jam it, and everything else.

Q Did you?

A Anything to get the rock out.

Q Could you -- would the rock flow smoothly?

A No. It didn't.

Q Did you have to open the doors wider because of that?

A Oh, yeah. We had them opened all the way. Then all of a sudden they'd come out. All of a sudden, if it broke loose it would come out. And it left big piles here, big piles there. And it really wasn't even all the way down.

Q So, you're saying the ballast that came out on the -- on both sides of the track was not even, you say?

A It was not even.

Q Okay.

A You had piles in one place, and it would get short and then run back up into big piles. You couldn't get it even because of the

Tr.112

way we was beating on it.

Q All right. When you were dumping -- when you were dumping that ballast on that particular occasion, did you continue to dump that rock all the way down the entire mileage, or are there any places where you stopped and started again?

A Well, you try not to make it through road crossings, and around switches. You try to --

Q What do you mean by road crossings; where some road comes across the railroad tracks?

A Right. Where the road comes across the railroad track, you try to avoid that. You try to keep the doors shut so you won't have to go back and shovel that off or nothing; so the people can drive.

Q So, in other words, if you approached crossings, you would stop the dumping and then start it again on the other side of the crossing, at some distance?

A That's right. Just right across the crossing.

Q What about on switches?

Tr.113

On occasion, did they do a little stop at the switches, sometimes?

A It all depends if you could get the door closed. Sometimes you did, sometimes you didn't. And most of the time you went right through it, it then would come out.

Q All right. Once you finished that dumping, or -- let me step back for a minute.

Why did you all dump the ballast in March of '93?

A We were getting ready for a T and S gang.

Q All right. And was Mr. Palmer coordinating that work with the supervisors that would bring in that big T and S gang?

A He was talking to them. So, I guess he was.

Q All right. This was -- the dumping was sometime in March, right, of '93?

And when did you -- did you learn at a later date that the T and S gang was not going to come through Burkeville, as scheduled?

A Well, yeah. They were scheduled for May. March, April, May. And they changed their mind and scheduled it 'til later.

Tr.114

Q All right. And as a matter of fact --

A They didn't --

Q -- when they rescheduled they never came through before August 20, 1993, did they?

A No, they didn't.

Q Okay. Well, you, from time-to-time, worked all the way from Burkeville to West Point with your gang truck, didn't you?

A That's correct.

Q Did you ever talk to Mr. Palmer, do you remember, about that ballast sitting there after, after the T and S gang had been cut off?

Did he ever comment to you about it?

A No, he didn't.

Q Did he know it was there?

A He helped dump it.

Q Did he ever ask any of your men to smooth the ballast rock, at any time after it was dumped, up until August of 1993?

A We got to smooth it down, but I don't remember the date. And this was after Trimiew and some people -- a train crew, they'd

Tr.115

been complaining about how high it was up there. So, after that we went down. Transportation men had been complaining and we went down there.

Q Okay.

A But, I don't remember the date.

Q Does the railroad have standards on how ballast is to be maintained and groomed along track, like in the area of Burkeville or anywhere on your line?

A Well, getting ready for a T and S gang, just being dumped. So --

Q Not the dumping. I'm talking about just normal track --

A Oh, yeah.

Q Are there rules on how the track is to be generally maintained, as far as ballast?

A Yes, there are rules. There are rules.

Q For groomed, maintained track, where is the ballast supposed to be in relation to everything that's on the track itself?

A It's supposed to be below the ties and -- so, the drainage -- it keeps the drainage good. And keep the track stabilized.

Tr.116

Q When you say "below the ties" --

A Yes. You got the ties, cross ties there.

Q If I can just hold this up. When you say below the ties --

A Yes.

Q Well, what is it, as far as the level --

A Well, coming up even with the ties; right.

Q So, you're saying that the ballast has to be even with the cross tie here, pretty much?

A Right.

Q Is it supposed to be in mounds or big piles?

A No, not -- not unless you're getting ready for a gang of T and S.

Q To work with?

A Right. To work with. Other than that, it's supposed to be like that. Six inches on each side and sitting in a curb we give twelve.

Q This six inches is from the cross tie end, right?

A Right.

Tr.117

Q And that's where the slope is to be?

A Right. It slopes down; gives it drainage and keeps the track from moving.

Q Where do men like yourself and other gang members walk when you're walking to repair or maintain track, generally?

A Well, most of the time we -- well, you're already out of the truck. You're walking in the middle of the track.

Q Okay. Are there any rules that say that unless you're working in side the rail, that you are to walk outside the rail?

A That's correct.

Q And that's a rule of the railroad; that you are not allowed to walk in between the rail, unless you're working inside the rail, correct?

A That's correct.

Q So, men, generally -- or a lot of times are walking on the margin, or the outside of the rail, right?

A Right. We walk on the outside; just walking down.

Q And does the standard about

Tr.118

keeping the ballast flat assist workers in anyway in having a flat walking surface to walk on?

A Yes. Definitely.

Q Did you know and work with Mr. Trimiew over those years from, I think, the late '80s you said, until 1993?

A Oh, yes.

Q You all worked together from time-to-time?

A Right.

Q Did you know whether Mr. Trimiew was generally a safe worker, at least as far as your knowledge?

A As far as my knowledge, he's a safe worker.

Q You were supervisor over him as a foreman, technically, weren't you; for a period of time there?

A For -- Yes -- well --

Q Just a number of months in '93?

A Yes.

Q Did you ever have to discipline him for any type of rule violation, or company rule?

A No, I didn't.

Tr.119

Q Did you ever have to turn him in for violating any type of rule or procedure?

A No, I didn't.

Q As a laborer out there, in general, would you agree that the men have to do work from time-to-time that

can be seventy-five or a hundred pounds of pushing, pulling, or lifting?

A Yes.

Q How much does a regular cross tie itself weigh on the railroad track; what are the ranges?

A About two hundred.

Q Sometimes men have to manipulate or move cross ties, don't they?

A Yes.

Q And do men have to swing a maul still on the railroad track?

A Yes.

Q And do they sometimes have to hammer in spikes?

A All the time. Yes.

Q Did you ever know whether Mr. Trimiew, any time before August 20th of 1993; the last day he worked, ever complained to you of any problem working on the railroad with physical

Tr.120

requirements?

A None that I know of.

Q Did he ever make any complaints about a back problem, of any kind?

A Not to me. No.

Q Do you all have a nickname for Mr. Trimiew?

A We call him Chief.

Q Does anyone every call him Slim?

A Slim. Chief.

Q All right.

MR. KOZAK: Please answer Mr. Kozak's questions. Thank you, Mr. McGinley.

THE COURT: Mr. Kozak?

MR. KOZAK: Your Honor, may we approach the bench?

May we approach the bench?

THE COURT: All right.

NOTE: At this time, a sidebar discussion is had off the record, following which the case continues, viz:

THE COURT: All right, Mr. Kozak.

Tr.121

CROSS-EXAMINATION

BY MR. KOZAK:

Q Mr. McGinley, you said that Mr. Trimiew was a safe worker. And as far as you knew he never violated any rule, right?

A That's correct.

Q And he never received any discipline?

A Not that I know of.

Q Are you aware that Mr. Trimiew was --

MR. SHAPIRO: I'm going to -- Your Honor, we need to approach the bench.

THE COURT: Let me hear the question.

BY MR. KOZAK:

Q Are you aware that Mr. Trimiew was disciplined as a result of the way he got out of the vehicle when he slipped in this case?

THE COURT: No. Do you object? What's your objection?

MR. SHAPIRO: Can I approach?

THE COURT: No, go back. Go back. Tell me what your objection is.

MR. SHAPIRO: My objection is

Your Honor, that Mr. Trimiew -- whether the company charged Mr. Trimiew with anything is irrelevant.

THE COURT: But you asked the witness whether he was ever disciplined for anything.

MR. SHAPIRO: I asked the witness if he was every disciplined by Mr. McGinley. He only worked as a foreman for him for six months.

THE COURT: Overruled. Go ahead.

BY MR. KOZAK:

Q I'm sorry, I lost your answer. Were you aware that Mr. Trimiew was disciplined as a result of the way he got out of the vehicle, in this case?

A Was I aware of it?

Q Yeah. Did you know that?

A Sometime later. Yeah, I heard about it.

Q After he fell?

A Sometime later I heard about it.

Q What did you hear?

A I heard that --

MR. SHAPIRO: Objection, Your

Honor. Hearsay.

THE COURT: Mr. Kozak?

MR. KOZAK: Withdraw

THE COURT: Objection sustained.

BY MR. KOZAK:

Q All right. Mr. McGinley, before March of 1993, you helped unload ballast before, hadn't you?

A Yes, I have.

Q And is that something that people in the gang do a lot, or whatever?

A Well, wherever we're getting ready for a T and S gang, they unload ballast.

Q Any idea in the years you've worked on railroad how many times you had unloaded ballast for a T and S gang?

A Not really.

Q A lot of times?

A A lot of times.

Q And every time you do that, the ballast is built up and high around the rail, right?

A Yes.

Q And it stays that way until the T and S gang comes through.

Tr.124

And then after the T and S gang goes through, it's regulated?

A Normally, yes.

Q That's the normal procedure?

A That's normal procedure.

Q Now, when the ballast is unloaded and its -- after it's been unloaded, and it's still high built up, it's difficult to walk in, isn't it?

A Very difficult.

Q And you knew that, didn't you?

I mean, you know that, right, from your experience working on the railroad?

A Yeah. Yes.

Q Is it fair to say that everybody who worked on the railroad around ballast knows that?

A Yes. I'll say, yes.

Q And, so, obviously knowing that, you need to be extra careful whenever in your job you have to walk in ballast that's still built up, right?

A Yes.

MR. KOZAK: That's all.

THE COURT: Is there any

Tr.125

redirect?

MR. SHAPIRO: Nothing further, Your Honor. Thank you.

THE COURT: Thank you very much. Mr. McGinley, you can step down. Can Mr. McGinley be excused?

MR. SHAPIRO: Yes. By the plaintiff, Your Honor.

THE COURT: Mr. Kozak, is there any reason why Mr. McGinley --

MR. KOZAK: He can be excused.

THE COURT: Mr. McGinley, you may leave, sir. If you'd like to remain in the courtroom, you may.

NOTE: At this time, Mr. McGinley is excused.

Your next witness, Mr. Shapiro?

MR. SHAPIRO: One moment, Your Honor. We call Joseph Wynn, Your Honor.

THE COURT: Wynn?

MR. SHAPIRO: Yes. W-Y-N-N.

THE COURT: You all are not talking about the case, I hope?

Tr.126

Okay. It's very important that you all are not talking about the case.

JOSEPH WYNN, a witness having been called upon by the plaintiff, and having been duly sworn, testified as follows:

DIRECT EXAMINATION
BY MR. SHAPIRO:

Q Could you please state your full name.

A Joseph Wynn.

Q Mr. Wynn, where do you live -- reside? Where do you live?

A Edenton, North Carolina.

Q Are you -- were you employed by the Norfolk-Southern Railway Company?

A Yes.

Q When were you first hired by the Norfolk-Southern Railway Company?

Tr.127

A 1974.

Q And when did you last work at Norfolk-Southern?

A Richmond.

Q What was the date, or the month that you last worked for the railroad?

A I think it was in May, I believe it was. I can't exactly recall what that date was.

Q May of this calendar year, '95?

A Yes.

Q And in 1993, what was your job with Norfolk-Southern?

A I was -- 1993?

Q Yes.

A I was working on their high rail truck.

Q All right. And did you work on the high rail truck with Mr. Forsythe?

A Yes.

Q And did you start working on that truck, actually, the day after Mr. Trimiew got hurt?

A Yes.

Q Prior to that time, were you a

Tr.128

member of the work -- of a work gang working with Mr. McGinley who just previously testified?

A Yes.

Q Who else was on that gang with you and Mr. McGinley?

A It was Ferebee.

Q Is that Linwood Ferebee?

A Linwood Ferebee.

Q All right.

A And also Curtis Folks.

THE COURT: Is this going to be any different than what Mr. McGinley said?

MR. SHAPIRO: I just -- I don't know, Your Honor.

BY MR. SHAPIRO:

Q Is there anyone else --

THE COURT: Well, if it's the same, we don't need to hear it again. If you think it's different -- Is there any dispute about who was on the gang?

MR. KOZAK: I don't know --

THE COURT: You all can stipulate to that.

MR. SHAPIRO: All right.

A And --

Tr.129

THE COURT: That's all right. We've heard that.

BY MR. SHAPIRO:

Q I'm sorry, was there one other person?

THE COURT: We've heard that. Let's go.

MR. SHAPIRO: All right.

BY MR. SHAPIRO:

Q During 1993, you worked on the gang truck?

A Yes.

Q Before August of '93?

A I worked on gang truck before I went on the high rail.

Q Okay. Before you went on the high rail truck, where did you work?

A I worked on the gang truck.

Q And was that the two ton gang truck we're talking about?

A That's right.

Q Prior to August of 1993, when you went on to the high rail truck to replace Mr. Trimiew, had you ever received any training about how a man was supposed to get in or out of

Tr.130

the cab of a high rail vehicle?

A No.

Q Had you gotten any training at all about how to get in and out of a gang truck?

A Afterwards.

Q After when?

A After Mr. Trimiew had got hurt.

Q All right. As of the time that Mr. Trimiew got hurt in 1993, had you ever heard of a phrase called three points of contact?

A No.

Q Do you know what the phrase three points of contact means, or when did you first hear about that?

A After Mr. Trimiew -- they sent a letter after Mr. Trimiew got hurt.

Q All right. When you got -- did you ever ride in the high rail truck with Mr. Forsythe before Mr. Trimiew got hurt in August of 1993?

A Yes.

Q Did you ever have that occasion?

A Yes.

Q Did you ride in the passenger side of that truck?

Tr.131

A Yes.

Q Did you have any particular manner in which you got out; that is, did you get out facing out like you get out of a car, or did you back out?

How did you do it?

A I get out facing -- backing out.

Q Backing out?

A Backing out.

Q Okay. But had the railroad told you how you were supposed to do that?

A No.

Q Were you involved in the ballast dumping operation in March of 1993?

A Yes.

Q Was Mr. Palmer?

A Yes.

Q When did you first hear, in 1993, that the T and S gang was not going to come through the Burkeville area, after the dumping was done, do you remember?

A I can't recall what that date was when they said they wasn't coming through.

Q Have you dumped ballast over the years in the past?

Tr.132

A Yes.

Q Normally, how often -- how quickly did a timber and surfacing gang come and do their maintenance, after the ballast is dumped?

A It may be about two or three months, something like that.

Q Was it ever less than that?

Was it ever less than two months?

A Yes. Yes. Yes.

Q All right. Mr. Wynn, did you ever operate a ballast regulator?

A Yes. A little bit.

Q And in 1993, prior to Mr. Trimiew getting hurt, was there a ballast regulator anywhere in the area of Burkeville, Virginia?

A Yes.

Q Where was it?

A Sitting on the sidetrack up there.

Q Is that the one you had operated before?

A I hadn't operated that one, but I could operate it.

Q Were there any other members of the gang that could operate that ballast

regulator, that you knew?

A Yes.

Q Who?

A Linwood Ferebee. And, also, Clay McGinley. And, also, Curtis Folks.

Q Okay. You said you've operated ballast regulators in the past?

A Yes.

Q Similar to the one in Burkeville?

A Yes.

Q Do you know about how many miles in which the stone, or the rock, had been dumped in that area of Burkeville, approximately?

A It might have been about -- approximately five or six miles.

Q All right. How long would it take to take that ballast regulator, if you were operating it, and smooth out all the stone that had been dumped, right over in that Burkeville area, in your opinion?

A I would say, approximately, about four to five hours.

Q After the stone had been dumped and before Mr. Trimiew got hurt, did anybody ever instruct you, or any members of the gang, to take

that ballast regulator and to plow -- smooth down that rock that had been dumped?

A No.

Q Who do you receive work assignments from?

A Mr. Palmer.

MR. SHAPIRO: That's all the questions I have, except for one more. Wait. I'm sorry.

Excuse me, Your Honor.

BY MR. SHAPIRO:

Q Is it true that our firm represents you, Mr. Wynn; our law firm?

Is it true that my law firm represents you on a claim that you have against Norfolk-Southern Railway Company?

A Yes.

Q You have a lung disease?

A Yes.

Q Thank you.

THE COURT: Any cross-examination?

CROSS-EXAMINATION

BY MR. KOZAK:

Q Good morning, Mr. Wynn -- good

Tr.135

afternoon.

A Good morning.

Q In the two or three months between when the ballast would get regulated, a T and S gang normally comes when the ballast would be built up along the rails, right?

A Yes.

Q And people would work in it in that condition, right?

A Yes.

Q And it would be more difficult to work in while it's built up, wasn't it?

A Yes.

Q People who work on railroads knew, didn't they?

A Yes.

Q When you testified that you would get out of a high rail vehicle backwards, facing the truck, do you remember that?

A Yes.

Q You said nobody at Norfolk-Southern instructed you to do that, right?

A Yes.

Q So, that was just your own common sense about the best way to get out, right?

Tr.136

A Right. That's right.

Q The safest way?

A Yes.

Q Thank you.

THE COURT: Is there any redirect?

REDIRECT EXAMINATION

BY MR. SHAPIRO:

Q Mr. Wynn, you've seen people get out facing out, or backing out of the cab of a high rail, haven't you?

A Yes.

Q Did you see Mr. Forsythe, the track inspector, ever get out of the cab of the high rail vehicle facing out, as opposed to backing out?

A No.

Q How does he get out?

A He get out face.

Q Did you ever see, before August '93, people getting in and out of the high rail truck, such as Mr. Trimiew and other people?

MR. KOZAK: Excuse me, Your Honor. I think I'm going to object without some foundation as to where this

is occurring. Is this a high rail vehicle in the yard, out on the track?

THE COURT: Mr. Shapiro?

BY MR. SHAPIRO:

Q Did you ever see people getting in and out of the high rail vehicle on the track before Mr. Trimiew was hurt?

A Yes.

Q Did you ever see people get out facing out of the cab, of the high rail vehicle?

A I can't recall right off-hand. But, I have seen them, you know, getting out -- most of the time they would be getting out the side, too, something like that. I didn't really pay that much attention.

Q Okay.

MR. SHAPIRO: No further questions.

THE COURT: Any other questions of Mr. Wynn?

MR. KOZAK: No, Your Honor.

THE COURT: Can Mr. Wynn be excused?

MR. SHAPIRO: By the plaintiff, yes, Your Honor.

Tr.138

THE COURT: Mr. Kozak?

MR. KOZAK: Yes.

THE COURT: Mr. Wynn, thank you very much, sir. You may step down, and you are free to leave, if you'd like.

If you'd rather stay in the courtroom, you may do that.

NOTE: At this time, Mr. Wynn is excused.

THE COURT: Your next witness, Mr. Shapiro?

MR. SHAPIRO: Mr. Ernest Jones, Your Honor.

THE COURT: Mr. Ernest Jones.

ERNEST JONES, a witness having been called upon by the plaintiff, and having been duly sworn, testified as follows:

Tr.139

DIRECT EXAMINATION

BY MR. SHAPIRO:

Q Good afternoon, Mr. Jones.

A Good afternoon. How are you doing?

Q Please state your full name, sir.

A Ernest Dallon Jones.

Q And what is your home address, Mr. Jones?

A Route 1, Box 249 J, Keysville, Virginia.

Q Mr. Jones, were you previously employed by Norfolk-Southern Railway Company?

A Yes.

Q Can you tell the jury when you first went to work for that railroad?

A February the 22, 1973.

Q And did you last work for the railroad in March of 1993?

A Yes.

Q Can you tell the jury some of the jobs you've held with the railroad; just generally, throughout your career?

A Yes. I was track laborer. Machine operator. And also a foreman.

Tr.140

Q And you were a foreman before Mr. McGinley became the foreman over the gang in Richmond?

A That's correct. Yes.

Q And how long had you been a foreman over that Richmond gang, prior to March of 1993; do you recall?

A Approximately, four -- approximately four years.

Q All right. Did you work under Steve Palmer, the track supervisor, for a short period of time there?

A Yes.

Q He came to Richmond, what, in 1991 or 1990?

A Somewhere along there. Yeah.

Q Did you participate in ballast dumping in March of 1993, in the Burkeville area?

A Yes.

Q And who was there, as far as supervisors, at the time that you were there?

A Mr. Steve Palmer. And also Mr. Barrett Forsythe.

Q All right. Can you describe the conditions of that ballast dumping, and tell us if

Tr.141

there's anything unusual about the day when you dumped that ballast.

A Yes. The day -- it was very cold that day. The ballast had gotten wet and it was frozen. And we -- as we proceeded to unload the ballast, the ballast -- when we opened the door the ballast wouldn't run out. We had to open the doors all the way up.

Q You mean, like the chutes?

A Yes. We had to beat on the side of the car, and also chunk up inside the ballast to get the ballast start flowing.

Q Did the ballast run out smoothly once you got it coming?

A No. It came out mostly in chunks. Frozen chunks.

Q Did that -- did a normal amount of ballast come out of the cars, as the cars moved? Did the cars move while the ballast is being dumped?

A Yes.

Q How fast are the cars moving along the track?

A Approximately, two to three miles

Tr.142

per hour.

Q And the men are walking along?

A Yes.

Q How was the flow of the ballast rock that was coming out?

A Oh, it was coming out piling up. Coming out in chunks, piling up along the rails.

Q Okay. Over how many miles -- well, let me -- wait a minute. I'm sorry. How many cars were in the ballast train that was unloading ballast, approximately, at that time?

A Approximately -- that day, it was about fifty-three, fifty-four cars.

Q And is there a specific distance over which that, approximately fifty car ballast train will cover, generally, as it's unloaded in a normal process?

A Usually, eight to twelve miles.

Q Eight to twelve miles?

A Uh-huh.

Q Did that train unload over eight to twelve miles?

A Approximately, five to six, I think it was.

Tr.143

Q So, was the rock compressed into a shorter distance?

A Yeah.

Q When your men on your gang worked on railroad track along the district that you were in, when the men got out of the gang truck, or whatever, would the men normally walk on the outside of the rail, or inside of the rail? And, explain that, please.

A Normally -- only reason you walk on the inside of the rail is in the line of duty; when you have to perform work inside the track. Otherwise, you have to walk on the out -- out of the gates of the track.

Q Were there any company rules or standards about how ballast was supposed to be maintained, normally?

A Yes.

Q And what are those?

A Ballast is to be maintained level with the ties, and six inches on -- I think it's six inches ahead of the ties and slope down.

Q All right. After you dumped the ballast, or -- let me ask it this way.

What did you understand, as

Tr.144

foreman, as to when the timber and surfacing gang was scheduled, at least, to come through to smooth the ballast that was dumped in March?

A Within a month, usually.

Q All right. Did the team -- well, you weren't there after March of '93, were you?

A No.

Q Did you get hurt on the day of the ballast dumping operation yourself?

A Yes.

Q Is our firm -- did our firm represent you in the past?

A Yes.

Q Does the fact that we represented you in the past affect your testimony today, in any way?

A No. I just came to tell the truth.

Q All right. Did you know whether there was a ballast regulator available for your gang, as of March of 1993.

THE COURT: Is his testimony going to be any different then what we've already heard?

MR. SHAPIRO: Possibly just on

Tr.145

one point, Your Honor.

THE COURT: All right. Let's get to the point you think is going to be different.

MR. SHAPIRO: Understood.

BY MR. SHAPIRO:

Q Was there a ballast regulator in that area?

A Yes.

Q Had you or your men ever used that regulator?

A Yes. We had Mr. Clay McGinley who was a qualified ballast regulator. Also, Mr. Linwood Ferebee.

Q Did the men use it under your supervision, from time-to-time?

A Yes.

Q Until March of 1993, when you last worked, had you ridden in a high rail truck like Mr. Forsythe operated on the track?

A Yes, I had.

Q Up until that time, did anybody ever use a phrase to you called three points of contact?

A No.

Tr.146

Q When was the first time you ever heard that phrase?

A When you asked about it. I haven't heard that phrase.

Q All right. Had you ever seen Mr. Forsythe get in and out of the high rail vehicle before March of 1993?

A Yes, I had.

Q Did you observe whether Mr. Forsythe always got out of the vehicle facing out, or backing out, or what did you see?

A Well, he used to get out facing forward, you know, and sometimes he might back out, you know. It didn't --

Q Did anyone ever tell you it ever mattered while you were working on railroad?

A No.

Q Thank you, Mr. Jones.

THE COURT: Cross-examination?

CROSS-EXAMINATION

BY MR. KOZAK:

Q Good afternoon, Mr. Jones.

A How are you doing?

Q In addition to the one case that Mr. Shapiro mentioned that his firm represents

you, you had another claim sometime before that in which they represented you as well, didn't you?

A Yes.

Q Something about hearing loss, or something?

A Yes.

Q So, that's -- they've been your lawyers in two cases before, right?

A That's correct.

Q And before that, did they represent you in any other claims?

A No.

Q Okay. Thank you, sir.

THE COURT: Is there any redirect?

MR. SHAPIRO: Nothing further.

THE COURT: Thank you very much, Mr. Jones. You may step down, sir. I assume that Mr. Jones can also be excused?

MR. SHAPIRO: Yes.

MR. KOZAK: Yes, Judge.

THE COURT: Mr. Jones, you're free to leave.

MR. JONES: Thank you.

Tr.148

NOTE: At this time, Mr. Jones is excused.

THE COURT: Your next witness, Mr. Shapiro.

MR. SHAPIRO: Mr. Linwood Ferebee, Your Honor.

THE COURT: Mr. Linwood Ferebee.

MR. SHAPIRO: Your Honor, we need to take a quick break. Mr. Trimiew needs a break.

THE COURT: All right. We'll stand in recess for five minutes. Members of the jury, we'll stand in recess for five minutes.

I know it looks like I'm up here pushing everybody fast. But, I need to do that because this case is going to last a couple days.

Do we have anyone on the jury that smokes? Any smokers?

I'm going to ask that you all go into the jury room. We'll stand in recess for five minutes.

Tr.149

NOTE: At this time, the jury exits the courtroom, and a brief recess is had; whereupon, the case continues, as follows:

THE COURT: You can bring the jury back, please.

NOTE: At this time, the jury enters the courtroom; whereupon, the proceeding continues, as follows:

MR. SHAPIRO: Our next witness is Linwood Ferebee.

LINWOOD FEREBEE, JUNIOR, a witness having been called upon by the plaintiff, and having been duly sworn, testified as follows:

THE COURT: You could be seated.

DIRECT EXAMINATION

Tr.150

BY MR. SHAPIRO:

Q Could you please state your full name, sir.

A Linwood Ferebee, Junior.

Q Mr. Ferebee, what is your home address, please?

A 525 Goshen Avenue, Edenton, North Carolina.

Q Are you employed by Norfolk-Southern Railway Company?

A Yes, sir.

Q And how many years have you been employed by the railroad?

A Coming this December will be twenty-one years -- I mean September it will be twenty-one years.

Q What position are you -- do you have with railroad now?

A Laborer.

Q During 1993 were you working as a laborer?

A Yes, I was.

Q And were you working out of the Richmond yard?

A Uh-huh.

Tr.151

Q Were you qualified to operate a ballast regulator machine in 1993?

A I wasn't qualified, but I used to run it.

Q You used to run it. How many years had you run a ballast regulator machine?

A We just -- on just district I had run it before, you know.

Q I'm sorry?

A I had run it. Just running it.

Q All right. Is a ballast regulator operator required to be familiar with the railroad company rules on maintaining ballast rock?

A Uh-huh. I think so.

Q Is that required to plow and to do the regulation?

A Uh-huh.

Q Were there railroad procedures on maintaining ballast rock in the area of Burkeville to Richmond?

A Yeah, it was, you know.

Q How was the ballast to be maintained?

A You plowed it down, you know.

Tr.152

You got it the height, you plowed it down.

Q What level is the ballast supposed to be outside of --

THE COURT: Is it going to be different than what we've heard?

MR. SHAPIRO: Just a couple points, Your Honor.

THE COURT: Is it going to be different?

MR. SHAPIRO: I think so.

THE COURT: Okay. If it's going to be. If it's going to be different from what Mr. McGinley told us?

MR. SHAPIRO: As I understand it.

THE COURT: All right.

BY MR. SHAPIRO:

Q Are you familiar how long it takes to regulate ballast?

A I don't know. Probably -- about five miles, four, five hours. Or something like that.

Q To regulate the ballast that was dumped at Burkeville?

A I think so. That particular day I remember.

Tr.153

THE COURT: You look very surprised, but that's the same thing the other witnesses said. Come on.

MR. SHAPIRO: All right, Your Honor.

THE COURT: Come on.

BY MR. SHAPIRO:

Q Were you ever --

MR. SHAPIRO: I'm trying to move through my testimony; taking a moment to try to cut things out, so just bear with me a moment, all right?

BY MR. SHAPIRO:

Q Had you ridden on a high rail, bread truck, type of truck, before August of 1993; the kind that Mr. Trimiew and Forsythe rode?

A No. I don't think I've been on that one.

Q Did you ever see people getting in and out of the high rail cab?

A Yeah.

Q Did you see -- how did you see them getting out?

A Like normal. They normally get out -- jump right out of it, if that's the way

Tr.154

they've been doing.

Q Had you ever heard of the phrase three points of contact, prior to August of 1993?

A No, I haven't.

Q When was the first time you ever heard the phrase three points of contact?

A I think after Trimiew got hurt. I think something about the three point contact. I never heard of that before.

MR. SHAPIRO: Nothing further, Your Honor.

THE COURT: All right. Is there any cross-examination?

CROSS-EXAMINATION

BY MR. KOZAK:

Q Mr. Ferebee, you remember before Mr. Trimiew fell on August of '93, sometime before that, Mr. Palmer had demonstrated getting on and off a gang truck?

MR. SHAPIRO: Objection. Leading.

THE COURT: This is cross-examination. Overruled.

BY MR. KOZAK:

A He demonstrated.

Tr.155

Q Is that right?

A Uh-huh.

Q And do you recall the phrase, or the terminology, three point contact being used in that demonstration?

A Uh-huh.

Q And that was before Mr. Trimiew was hurt, is that right?

A No, I don't think so.

Q Well, the demonstration with Mr. Palmer was sometime before Mr. Trimiew fell, isn't that right?

A It might have been. I don't remember, you know. I just don't remember that.

Q All right. That's fine. Thank you.

THE COURT: Is there any redirect?

REDIRECT EXAMINATION
BY MR. SHAPIRO:

Q If Mr. Palmer talked about the -- what he was talking about the gang truck, where was the demonstration being done when he talked about the gang truck?

A Right in front of the office out

Tr.156

there, you know.

Q Was he talking about it in the rear of the truck, at the bed?

A The rear of the truck, yeah.

Q Thank you.

MR. SHAPIRO: That's all I have.

THE COURT: Anything else for Mr. Ferebee?

MR. KOZAK: I almost forgot.

RECROSS-EXAMINATION
BY MR. KOZAK:

Q Do you have a claim against the railroad, in which Mr. Wilson's firm represents you, don't you?

A No, I don't.

Q Did you have one -- you had one in the past, though, didn't you?

A I think about that hearing loss, or something about that.

Q Excuse me?

A About the hearing loss, or something like that.

Q You had a hearing loss against the railroad?

A That's been quite a while or so.

About a year or so ago.

Q And Mr. Shapiro's firm and Mr. Hajek's firm represented you in that?

A I think so.

THE COURT: Any other questions?

MR. SHAPIRO: Nothing further.

THE COURT: All right. Mr. Ferebee, you may step down, sir. And unless I hear an objection from counsel, you are free to leave.

Or if you'd like to remain in the courtroom, you may.

Next witness, Mr. Shapiro?

MR. SHAPIRO: We call the plaintiff, Mr. Trimiew, Your Honor.

THE COURT: Okay.

MR. SHAPIRO: It's going to be long.

THE COURT: Why don't we break for lunch. Members of the jury, it's about quarter to one. I'm going to --we're going to take a luncheon recess.

I'm going to ask that you all be back here at quarter to two. That gives you about an hour to get something to eat.

Again, it's very important that you not talk about this case; either among yourselves or with anyone else. Have a good lunch and we'll see you back here at quarter to two.

NOTE: At this time, the jury exits the courtroom for a luncheon recess; whereupon, the proceeding continues, out of the presence of the jury, as follows:

THE COURT: Counsel, anything we need do before --

MR. SHAPIRO: I have one brief matter. The Court made the ruling on the rule issue, and I'm going to be talking to Mr. Trimiew. I need to make sure I understand.

He was allowed, by the Court, to ask about the rule; which they charge him with the rule violation. I want to make sure I know about the scope, now that the door is cracked. I want to know if it's going to be broken wide open.

Tr.159

Now, they did an investigation and these people testified ex parte. And a lot of the case law says --

THE COURT: What do you mean? The question that you objected to was, was Mr. Trimiew disciplined by the railroad.

MR. SHAPIRO: Right.

THE COURT: You had asked on direct examination of a foreman, did you ever discipline Mr. Trimiew. Are you saying that it was okay to ask this particular foreman, but if another foreman had not disciplined him, that that's not relevant?

I'd like to hear your argument on that, if that's your argument.

MR. SHAPIRO: No, that's not what I'm saying.

THE COURT: Okay. What is it?

MR. SHAPIRO: I want to make sure you understand. It's not that.

THE COURT: That's the only --

MR. SHAPIRO: I'm not trying to -- I'm not trying to reopen that. No. What I'm saying -- let me explain.

Tr.160

THE COURT: What's your question for me?

MR. SHAPIRO: There was an investigation done. The railroad charged -- the charge is one thing. To say they charge you.

The scope --

THE COURT: Let me -- because I want to give you all time to get something to eat, too.

Are you asking me what questions you will be allowed to ask?

MR. SHAPIRO: No. I would like to know --

THE COURT: Well, are you asking me what questions Mr. Kozak is going to be allowed to ask?

MR. SHAPIRO: We want to exclude further reference to the investigation itself. If the Court says that a charge --

THE COURT: No. Listen to my question. No, stand. Are you asking me what questions I'm going to allow you to ask, or are you asking me what questions

Tr.161

I'm going to allow Mr. Kozak to ask?

MR. SHAPIRO: Mr. Kozak.

THE COURT: Well, I mean, when Mr. Kozak asks a question that you feel is inappropriate, object.

I mean, I've listened to motions in limine. And to the extent that I can rule on them, I do. I heard motions in limine this morning. I made a ruling on that.

But, then you -- I don't think this has anything to do with rules. I mean, this has something to do with discipline. And I'll tell you now, if you ask a question -- I don't know why it was relevant whether this foreman, Mr. McGinley, had disciplined Mr. Trimiew.

Had I been defending, I would have objected. Mr. Kozak chose not to object, and now I know why. Because, he wanted to ask the question on cross-examination.

Any time you ask a question, Mr. Kozak is going to be allowed to ask a question on cross related to that.

Tr.162

MR. SHAPIRO: I understand, Your Honor. We're not opening the door to talk about the investigation itself; is what I'm saying. That's what we're concerned with. I don't want to create -- I mean, I've been there. I worked a lot to get to this point. I don't want to --

THE COURT: It doesn't sound to me, at this point, that you have, but I don't know. I have to hear your argument in the context of a particular question. That's one of the problems with motions in limine.

That's why I say I try to rule on them, because I think it's helpful. But, sometimes I have to hear the precise question that's asked. And I think this is one of those circumstances.

You know, the question you asked, had you all asked me that before trial and said, can I ask that question? I would have said, no.

But, once you asked it, then I have to allow the defendant to follow up on it. So --

Tr.163

MR. SHAPIRO: I understand. I don't have any problem with that. It's just that I feel like the -- what the people said, and in that investigation they held, where they took transcripts, should be off limits.

Because, what that tribunal --

THE COURT: Why don't you talk to Mr. Kozak at lunch and see if he plans on trying to get any of that in. He may not want to get any of that in. If he does, then when he attempts to do it, make your objection. I'll rule on it. All right. Anything else we all need to talk about?

We'll stand in recess until quarter to two.

THE BAILIFF: This Court stands in recess.

NOTE: At this time, a luncheon recess is had; whereupon, the proceeding continues out of the presence of the jury, as follows:

Tr.164

THE COURT: All right. Counsel, are we ready to get started? I understand that one of the jurors was sitting in the wrong courtroom. You can bring the jury back in, please.

NOTE: At this time, the jury enters the courtroom; whereupon, the proceeding continues in the presence of the jury, as follows:

THE COURT: All right. Now, that we're in the right place, we can get started.

Mr. Shapiro, who's the next witness, sir?

MR. SHAPIRO: My next witness is Mr. Trimiew. Your Honor, right before I call him, I would like to read three more Requests for Admissions. I've talked this over with Mr. Kozak.

THE COURT: You've shown that to Mr. Kozak?

MR. SHAPIRO: Yes.

THE COURT: All right. Members

Tr.165

of the jury, Mr. Shapiro is going to read three more statements that the defendant has admitted are true.

MR. SHAPIRO: Plaintiff's request for admissions number four. "Admit that there is no compulsory

retirment [sic] age for men in plaintiff's work classification. The answer is, "admitted."

Number five. "Admit that the compulsory retirment [sic] age in the plaintiff's work classification is seventy years of age." Answer, "denied."

Six. "Admit that plaintiff and all persons in plaintiff's occupation had received periodic increases in rates of pay, and fringe benefits from the date of the plaintiff's first date of hiring, until the time of the accident." Answer, "admit."

THE COURT: All right. Now, Mr. Trimiew, would you come to the witness stand, sir.

Tr.166

CLINTON TRIMIEW, the plaintiff, having been duly sworn, testified as follows:

THE COURT: You may be seated.

DIRECT EXAMINATION
BY MR. SHAPIRO:

Q Afternoon. Could you please state your full name to the jury and Court, please.

A Clinton Garnet Trimiew.

Q What is your home address, Mr. Trimiew?

A 1317 North Thirty-second Street.

Q Richmond, Virginia?

A Richmond, Virginia.

Q And what is your present age, Trimiew?

A Sixty-seven.

Q And have you lived in the Richmond area your whole life?

A Yeah.

Q Who resides with you, now, in Richmond?

Tr.167

Does your wife reside with you?

A Wife.

Q And her daughter?

A Her daughter. Yeah.

Q Mr. Trimiew, how far did you go in school, as far as your schooling?

A Eighth grade.

Q Did you attend school here in Richmond?

A No.

Q Why did you stop going to school, in the eighth grade?

A Because, stop going to school; went to work to take care of my sister.

Q How old were you when you actually were hired by Norfolk-Southern Railway Company, the defendant?

A Forty-five.

Q Between when you were a young teenager and when you were forty-five, could you just briefly tell the jurors what kinds of jobs you had, and with who.

A First job would be Philip Morris. Next one was Lee Industries.

Q All right. What kinds of things

Tr.168

did you do at that Lee Industries job?

A Well, first of all I was in the box department making -- cutting out lumber for boxes with a rib saw.

Q What is a rib saw?

A It's a table saw that you cut out lumber -- and the next one I was really -- the box department went out of business. They went and put me in the furniture department, making -- running the molding machine.

Q All right. And was Lee Industries the last position you held before you started working with Norfolk-Southern Railway?

A Yes.

Q What year did you start with the railroad?

A April of '72 -- '73.

Q All right. And what job did you take when you started with Norfolk-Southern Railway Company?

A Track laborer.

Q And has that been the job that you had ever since up until 1993; laborer?

A Yeah.

Q So, how many total years did you

Tr.169

work with the railroad? Is it just over 20 years?

A Over 20 years.

Q Did you have a nickname on the railroad of Slim?

A Some called me Slim. Some called me Chief.

Q Tell us about some of your duties as a laborer; just in general terms, so the jury understand what you did?

A Sometimes we had to pull ties. Put ties in. Spike them up. Chain and drill the holes and put joints on them. And all different things. From all the way from West Point to Richmond to Burkeville.

Q Okay. Over those years, those twenty odd years, was the railroad the main source of your income?

A Yes.

Q What was your last date of work with the railroad; was it August 20, 1993?

A August 20, 1993.

Q Why was that your last day?

A Because, I fell and hurt -- and

injured my back.

Q Before we go into the details there, let me ask you some more things about your job. What were you -- and what you were earning. Over those last two years in 1992 and 1993, for example, what were you earning a year with the railroad?

A 1992 was over -- a little over thirty-two thousand. That was '93 -- no, '91. '92 was thirty-one thousand.

Q All right.

THE COURT: You can approach the witness.

MR. SHAPIRO: Thank up, Your Honor.

BY MR. SHAPIRO:

Q Mr. Trimiew, let me show you those two W-2's for 1992 and 1993. Are those the W-2's you received from the railway company?

A Yeah.

Q And in 1992, did you earn thirty-one thousand six hundred and nineteen dollars and twelve cents?

A Yeah.

Q And for '93 you worked up until

August, right?

A Yeah.

Q And you earned twenty-two thousand six hundred forty-nine dollars --

A And eighty-eight cents.

MR. SHAPIRO: Your Honor, I'd move to introduce them.

THE COURT: Any objection?

MR. KOZAK: No, Your Honor.

THE COURT: That will be admitted as one exhibit, Plaintiff's Exhibit Number 6.

NOTE: The above-referred-to 1992 and 1993 W-2 forms were marked and filed as Plaintiff's Exhibit No. 6.

MR. SHAPIRO: Jointly as number six? Jointly as one exhibit?
THE COURT: Yes. Plaintiff's Number 6.
MR. SHAPIRO: Thank you.

BY MR. SHAPIRO:
Q How many hours did you usually work a week, during these last couple years?

Tr.172

A Well, regular working hours was 40 hours -- 40 hours a week.
Q Mr. Trimiew --
A I mean, eight hours a day. But most of the time I -- we'd be on the high rail, I'd work most of the time overtime.
Q Mr. Trimiew, have you ever testified in a courtroom before?
A No, I haven't.
Q I put some water up there for you, if you need something to drink Was there any wage raise for workers in your position in July of 1993; a month or two before your last day of work?
A Yes.
Q And how much was that; was it a three percent increase?
A Three percent increase.
Q As of the summer of 1993, how old were you?
A Sixty-five.

Q And what were your plans for your future with Norfolk-Southern, as of the summer of 1993?

A Trying to keep on working.

Tr.173

Q Did you and your wife ever discuss how long you were going to work by that time?

A Yeah, we discussed it.

Q And did your wife work, at that time?

A No. No. She's --

Q When were you planning to work until?

A I planned to work until I was about seventy. I felt good.

Q Well, what was your physical condition, as of the summer of --

A I was in good shape. I was in good physical condition.

Q Had you had any company physicals --

A Yeah.

Q -- between, let's say, 1988 and 1993?

A Yes.

Q And what is a return to work physical with the railway company; could you tell the jury?

A You have to -- the company

Tr.174

supervisor sends you to a company doctor, and then the company doctor gives you a physical.

Q Did the doctor -- the company doctor -- on those occasions check your spine?

A Yes.

Q Your back?

A Yes.

Q Did they have you do any movements, or did they --

A Yeah.

Q -- give you a physical examination of your ability to move?

A Yes.

Q Did you go to any doctors for any back problems between 1988 and August of 1993, when the accident happened?

A Not as I can remember.

Q All right. Would you be working for the railroad now, if you hadn't been injured in August of 1993?

A Yes.

MR. KOZAK: Object, Your Honor. That's speculative.

THE COURT: I think it's a good objection to that specific question.

Tr.175

Mr. Shapiro, you can probably rephrase it.

MR. SHAPIRO: I'll move on.

BY MR. SHAPIRO:

Q What type of physical lifting requirements were there for a person who was a laborer with the railroad, during your last few years?

A Well, I was on the high rail and we had to cut the plugs to put in the track. We cut plugs for the welding -- to put in track for the welding.

Q What is a plug? Do you mean a plug of metal rail?

A Metal rail six feet long.

Q What do those weigh?

A That's a hundred and thirty-two pounds, six feet.

Q Did you move those plugs around in your job duties?

A Two of us. Me and Mr. Forsythe.

Q All right.

A We used to load them on the high rail and bring them down the track.

Q Let me turn your attention to before 1993. Were you in a car accident in 1987?

Tr.176

A Yes.

Q And did you miss any time from work?

A Yes.

Q And did the company give you a physical before you could return to full duty in 1987, or early 1988?

A Yeah, they give me a complete physical.

Q Where did they send you to?

A The doctor on Hull Street. I can't think of his name.

Q Does Dr. Kramolowsky sound like the name?

A Yeah. Yeah.

Q What did he do as far as determining whether you can go back to duty as a laborer, when he examined you?

A He checked me all over. He checked me all over, from my shoulder on down to my back. He had me bend down, stoop over. Touch the floor with my hands. Raise my leg up and hit on my knees.

Q Did he report to the railroad?

A Yes.

Tr.177

Q And did you get cleared for full duty back in 1988?

A Yes, I did.

Q Did you have any other physicals after that by the company; between 1988 and 1990?

A I had another physical for the commercial driver's license.

Q Did that doctor check your back out, also?

A Yes.

Q And that was at the request of the company?

A Right.

Q Did you get clear?

A Cleared for full duty.

Q Mr. Trimiew, over the last several years, did you work as a laborer assisting the track inspector, Mr. Bob Forsythe?

A Yes. Right.

Q What did the assistant track inspector generally do for the railroad? We've heard some of that.

A We'd go along the track. Inspect the rails. And if we see anything wrong, we'll stop and correct it; check switches from one end

Tr.178

of the territory to the other. And if we find anything broke, we had to fix it. Broken combine joints. Joints that tied the rail together with the switch. We had to fix it.

Q Okay. You're familiar with --

THE COURT: Let me interrupt you for just a moment. It's very important that all of you pay attention and listen to all the evidence. If you feel you need to take a break, just let me know and we'll take one. But everybody needs to stay awake.

Go ahead, Mr. Shapiro.

MR. SHAPIRO: Thank you, Your Honor.

BY MR. SHAPIRO:

Q You've heard testimony about a T and S gang. You're familiar with what a T and S gang is, right?

A Yes. I know mainly, but I know what a T and S gang is.

Q But you worked around them when they were --

A Worked around them.

Tr.179

Q -- were working, sometimes, right?

A Right. I worked around.

Q And let me turn your attention to questions about a ballast regulator, okay?

Was there a ballast regulator in the area of Burkeville, Virginia in 1993?

A Yes. There was a ballast regulator in the area of Burkeville form 1980 til [sic] 1993.

Q Had you seen it yourself before?

A Yes, I seen it myself.

Q Was it working? Was it used during that year?

A Yes, it was working.

Q Let me turn your attention now to the date of the accident, Mr. Trimiew. You were in, I guess, a one person gang. And you worked with Mr. Forsythe, right?

A Right.

Q And was he your supervisor?

A Yes, he was the supervisor.

Q Did he -- who, between the two of you, determined what you were going to do and where you were going to go each day?

Tr.180

A Mr. Forsythe.

Q All right. I want to show you some pictures, Mr. Trimiew.

MR. SHAPIRO: I think they're already in evidence. The pictures of the high rail.

THE COURT: Of the high rail?

MR. SHAPIRO: All of those, Your Honor.

THE COURT: Well, let's see where we go with those.

MR. SHAPIRO: Okay.

THE COURT: Again, if he's going to say something different about them than what we've already heard, feel free to do so. Go ahead.

MR. SHAPIRO: Yes. I want to show that one. Are there any other pictures, or are these the only ones? Just those two. Okay. That's fine.

THE COURT: But only if you're going to ask him something different than we've already heard.

MR. SHAPIRO: Yes, Your Honor.

Tr.181

BY MR. SHAPIRO:

Q Mr. Trimiew, do you have a picture there of the opened door of the track inspector's truck?

A Yes.

Q And is this just a larger picture of that picture you're looking at?

A Right.

Q This vehicle ran on the tracks, or on the highway, right?

A Right.

THE COURT: Come on, Mr. Shapiro. I mean it. Let's just get to something that we haven't heard.

MR. SHAPIRO: I understand.
THE COURT: We've heard that.
MR. SHAPIRO: Yes.
THE COURT: I know you're going to tell me you're going to get to something different. I want you to get to the different part now.
MR. SHAPIRO: All right. All right.
THE COURT: Let's go.

BY MR. SHAPIRO:

Tr.182

Q Mr. Trimiew, on the day of August 20, 1993 where did you leave with Mr. Forsythe to start working; from where?

A From Richmond to -- we went up there on the highway to Burkeville and got on at Burkeville and headed back to Richmond.

Q Okay. When you say you got on at Burkeville, you mean you put the high rail truck on the rail?

A Put the high rail on the rail on the crossing.

Q And --

MR. SHAPIRO: Do we have that map around hear somewhere?

THE COURT: Why -- what -- Is there a dispute about where this took place?

MR. KOZAK: No.

MR. SHAPIRO: No, Your Honor.

THE COURT: Well, if there's not a dispute why do you really need to be showing this witness the same --

THE COURT: I was just going to show the jury where he got on.

THE COURT: But, if there's no

dispute -- I mean, if you tell me that's relevant and it makes a difference whether he got hurt in the City of Burkeville or one mile out or five miles out, I'll let you show it to the jury again.

I really don't understand what difference it makes where on that map he got hurt.

MR. SHAPIRO: Okay.

THE COURT: All right.

MR. SHAPIRO: Well, it matters for a number of reasons. But, I don't think it's disputed where he got on --

THE COURT: No. If you can --

MR. SHAPIRO: So, I agree with you.

THE COURT: No. If you can explain to me why it is. I don't want to prevent you from putting on your case. But, I do want to prevent you from taking up more time than is necessary for presenting your case

MR. SHAPIRO: And I agree with you.

THE COURT: All right. Let's go,

then.

BY MR. SHAPIRO:

Q So, you put the vehicle on in Burkeville sometime in the morning of August 20th?

A Right.

Q Okay. And what happened next, after you started heading north back towards Richmond?

A Well, all I can recall is that I think we stopped at a few switches there in Burkeville and checked on them.

Q All right. At those points, was there mounds of ungroomed ballast where you stopped?

A Not around the switches.

Q All right. And then where did Mr. Forsythe head? Did he head north or --

A He headed north.

Q Did he tell you he was getting ready to stop to cut down bushes after that; right before the accident happened?

A I think he stopped first. Then he said he had a bush to cut.

Q You can put those photos down. I

Tr.185

don't think we're going to refer to them, yet, Mr. Trimiew. Who selected the spot to stop there?

A Mr. Forsythe.

Q What did you do? Who got out first?

A Mr. Forsythe.

Q And was he driving the truck?

A He was driving the truck.

Q All right. And what -- did you have to do anything before you started to get out of the truck?

A I reached down and got my hard hat and put it on.

Q Did you have any other safety equipment you had to put on before you got out of the truck?

A Hard hat and gloves.

Q And then what do you do next?

THE COURT: Is there a reason you're holding that up there?

MR. SHAPIRO: Because the jury can see how --

THE COURT: Well, if you want

Tr.186

Mr. Trimiew to refer to anything on this picture, let's get to that picture now. I want the jury to pay attention to Mr. Trimiew. Unless, you want the jury to pay attention to the picture.

MR. SHAPIRO: When it gets to the point, I'll --

THE COURT: Yeah. When we get to that point, you can show it to the jury. But you were asking him questions and just holding the picture up, and I'd rather the jury focus on Mr. Trimiew.

MR. SHAPIRO: Okay.

THE COURT: Okay. Go ahead.

BY MR. SHAPIRO:

Q What happened next, Mr. Trimiew, when you turned in the seat?

A When I turned in the seat?

Q Yeah. When you started to get out.

A I turned around and I looked down on the ground. And it looked safe to get out. So, I took it and reached up and put my hand on the door and reached up to grab the iron. I stepped down on the ballast. And as I

Tr.187

stepped down on the ballast, the ballast just rolled out from under me likes marbles.

Q And where did you go? Where did your body go?

A I went down in the ditch and landed down in the ditch.

MR. SHAPIRO: Now, Your Honor, I want to hold up the photo here. Could I approach the witness, or can we use the easel?

THE COURT: Which would you rather do? Do you want to use the easel?

MR. SHAPIRO: I'd rather -- just so he can point, without getting up.

THE COURT: All right.

BY MR. SHAPIRO:

Q Mr. Trimiew, where did you put our hands when you were getting out of the truck? Just point.

A I put my left hand over there and reached for the grab iron up there.

Q So, is there a grab iron up here? It's hard to see it.

A There's supposed to be. I think it is a higher one.

Tr.188

Q And where was Mr. Forsythe, when you slid down the ballast line?

A He was over there cutting the bush down.

Q And did you feel anything when you slid?

A When I slipped down in the ditch, I felt something pop in my back.

Q And how soon did Mr. Forsythe come around the truck, to see you on your side?

A When I hollered.

Q Did he come around the back, or the front of the truck?

A He come around the back.

Q And where were you when he first saw you? What position were you in?

A I was sit -- I was sitting on -- like I said, I pulled myself up and sat up on the side of the bank. I reached down and picked up my hat and had put on my hard hat.

Q Where had your hard hat gone?
A Fell down beside me. Fell down in the ditch.
Q At that point, when you were

Tr.189

seated there, was the ballast -- describe the ballast rock, at that point there.

A The ballast was up to -- it was even with the top of the rail.

Q Top of the rail?

A Top of the -- yeah. But, it was -- you know, not against the rail, but it was about this far from the rail. It was just up to the top of it.

MR. SHAPIRO: Your Honor, may I hold this up and let him demonstrate.

THE COURT: Yes, sir.

BY MR. SHAPIRO:

Q Mr. Trimiew, I put some red lines on here, but I don't want you to be influenced by that. I want you to tell the jury, by looking at this diagram, how high the ballast rock was on both sides of the rail?

A The ballast rock was just about like this.

THE COURT: Can you hold it and turn it around a little bit, so the jury can see?

Q Yeah. So, the jury can see it.

Tr.190

A Just about like he got it, on both sides of the rail.

Q Okay. Mr. Trimiew, do you have some photographs there that you took; two photographs of the ballast?

A Uh-huh.

THE COURT: Yes, sir, what's the question?

MR. SHAPIRO: He hasn't found them yet. Then I'm going to ask him.

THE COURT: What's your question?

BY MR. SHAPIRO:

Q Did you take those pictures of the area where you fell?

A Yes. I took the pictures of where I fell.

Q And was that the exact area, pretty much, where you fell?

A Pretty much exact area.

Q Was the ballast in the same general condition in those photographs, as to when you fell?

A Yes.

Q Can you point to the jury and kind of tell them where it was that you fell?

Tr.191

Maybe we'll put -- maybe you can just put some little type of arrow next to the photo, or something, where the general area was.

A Right up here. Right where you can't see nothing. Right up here where the rail stops. That's just -- almost at the crossing. And down here from the crossing here, by the rail, the ballast is up to the top of the rail. That's where I fell.

Q Okay. Are there any other photographs? Let me take that from you, Mr. Trimiew.

A There's another photograph. I don't know who took this one. But, this photograph is why we stopped -- where we stopped. You can see the ballast. You can see the ballast high right there, and all the way back. But, they're usually not up against the rail here. That's why they started cutting off back here, because there's a crossing right there.

Q So, you're saying toward the foreground, the ballast isn't in mounds, at that point?

Tr.192

A Right.
Q Okay.
A We started cutting the ballast off.
MR. SHAPIRO: Your Honor, could we mark this first one as the next Plaintiff's Exhibit.
THE COURT: Any objection, Mr. Kozak?
MR. KOZAK: Is that the one he testified that he didn't know who took it?
MR. SHAPIRO: That's the one he took; one of the ones he took. This is the one.
MR. TRIMIEW: That's not the one I took right there. Yeah, that's the one I took.
MR. KOZAK: I didn't hear him testify as to when he took it.
THE COURT: He didn't. Do you have any objection?
MR. KOZAK: Yeah, I object, without a proper foundation.
THE COURT: All right. Objection is overruled. This will be Plaintiff's

Tr.193

Exhibit Number 7.
MR. TRIMIEW: This is the one I took.

NOTE: The above-referred-to photograph was marked and filed as Plaintiff's Exhibit No. 7.

BY MR. SHAPIRO:

Q All right. You're holding up another picture. That's the one you didn't take?

A Yeah. That's the one.

Q And you talked about that one just now?

A Right. Yeah.

Q All right. Let's go ahead and advise the Court. Was that provided by the railroad in the litigation?

A Yes.

Q Okay.

THE COURT: Any objection, Mr. Kozak?

MR. KOZAK: No, Your Honor.

THE COURT: All right. This will be the next --

Tr.194

BY MR. SHAPIRO:

Q And is there another photograph?

MR. SHAPIRO: I'm sorry, Your Honor.

THE COURT: That's all right. Go ahead.

NOTE: The above-referred-to photograph was marked and filed as Plaintiff's Exhibit No. 8.

BY MR. SHAPIRO:

A Yes. Here's another one.

Q And did you take that photograph?

A Yes.

Q And where was -- can you hold that up so the jury can see it?

A That's supposed to be -- that's a rail right there.

Q Okay.

A And I slid from the ditch across the rail.

Q What were you trying to show in that photograph?

A How high the ballast was from the

Tr.195

ties up to the rail.

Q Okay.

MR. SHAPIRO: I move to introduce that.

THE COURT: Mr. Kozak.

MR. KOZAK: No objection.

THE COURT: That will be Plaintiff's Exhibit Number 9.

NOTE: The above-referred-to photograph was marked and filed as Plaintiff's Exhibit No. 9.

MR. SHAPIRO: All right. Let me see. I think that one is already an exhibit. Hold on to that one, okay? Your Honor, should I move to introduce this.

THE COURT: Any objection, Mr. Kozak?

MR. KOZAK: Well, Your Honor, I believe that the plaintiff did not make the drawings. Mr. Shapiro made those and --

THE COURT: You do object?

Tr.196

MR. KOZAK: I do object.

THE COURT: I think you have to establish what those marks are.

MR. SHAPIRO: All right.

BY MR. SHAPIRO:

Q Mr. Trimiew, there's a circled red area there. What is that circled red area?

A How high the ballast is.

Q Where the circle is. Would that have been the general area in which you would have stepped down?

A Yeah. Yeah.

Q And what are the little dotted red lines? Did you --

MR. SHAPIRO: I think he's already testified that that's where the mounds of ballast were. So, I think I'd move to introduce it, Your Honor.

THE COURT: Any objection?

MR. KOZAK: No objection.

THE COURT: All right. That will be Plaintiff's Exhibit Number 10.

MR. SHAPIRO: Thank you.

Tr.197

NOTE: The above-referred-to drawing was marked and filed as Plaintiff's Exhibit No. 10.

BY MR. SHAPIRO:

Q Well, Mr. Trimiew, was the ballast rock groomed in the normal fashion where you slipped?

A No, it was not.

Q Was that area where you slipped the same area over which that ballast had been dumped in March of 1993?

A Yes.

Q How long after ballast dumping, in your experience, is it that the T and S gang comes through and does its maintenance and smooths [sic] the rock?

A Usually, it'd be, most of the times, a month to two months.

Q Did you understand, whether Mr. Palmer or Mr. Forsythe knew that the T and S gang was not coming through?

A Yeah. They knew. Yeah, I hear that they knew they wasn't coming through.

Q Well, had you and Mr. Forsythe

Tr.198

passed that very area where you fell on work days before August 1993?

A Yes.

Q Had you seen that there -- did you know that the ballast was in mounds in that general area?

A Yes. I knew ballast was in that general area. But, I didn't -- we had never stopped, not that I can remember, in that area anymore than we had the switches.

Q How much area of track did you all cover in your duties, from West Point to Burkeville?

A Fifty-three miles, I think. A little over fifty-seven miles.

Q Richmond to Burkeville?

A Burkeville to Richmond.

A How about Richmond to West Point on the other side?

A Forty-eight miles.

Q Okay. And was ballast dumped in mounds like that anywhere but that area of Burkeville?

A Just in that area.

Q Was the ballast in March of '93

Tr.199

dumped near a railroad crossing, where the road came across?

A No.

MR. SHAPIRO: Your Honor, at this point we have about a three minute videotape that we'd like to show.

THE COURT: All right. Mr. Kozak has seen it?

MR. SHAPIRO: Yes.

THE COURT: Mr. Kozak, you have seen it?

MR. KOZAK: Yes, I have. I don't have any objection to it.

THE COURT: All right.

MR. SHAPIRO: Put it right here, Your Honor?

THE COURT: Yeah.

MR. SHAPIRO: Could have Mr. Trimiew stand in front of -- stand right here while it's being shown?

THE COURT: Any objection?

MR. KOZAK: No, Your Honor.

THE COURT: All right. Mr. Trimiew, you may step down, sir.

Tr.200

NOTE: At this time, a video is now being show; whereupon, the proceeding continues, as follows:

Q Okay. Mr. Trimiew, what is being shown right here?

A Two inspectors are walking down the track, checking ties and marking the bad ones.

THE COURT: You need to keep your voice up.

BY MR. SHAPIRO:

Q Yes, they need to hear you.

A The two track inspectors are walking down the track, checking bad ties.

Q Is that the kind of truck, generally, that you were in with Mr. Forsythe; riding on the high rail?

A Right. That's the kind of truck.

Q And this is the kind of work that you all did?

A Yeah.

Q Okay. Now, what is being shown in this instance?

A That's a bush hog that comes down the track about every three years and cuts bushes

Tr.201

down on both sides of the track, at the same time.

Q Now, when you're in between the three years, is this the kind of things that you and Mr. Forsythe checked for, to make sure bushes weren't over-hanging?

A Yeah. Right. Between the three years, me -- the bush hog goes out like that, stops, and cuts them down.

Q Okay. What is this? Is this ballast rock in a normal condition, or in an abnormal condition?

A That's ballast rock in a normal condition, like it should be. That's a painter going down painting the ties for the T and S gang.

Q Now, what do they do, do they mark these so the T and S gang will know which ones to replace?

A Marks them so they know which ones to replace.

Q Was that done around the time that the ballast was dumped in Burkeville?

A Yes.

Q And now what's being shown here, Mr. Trimiew?

A That's the train cars, empty

Tr.202

cars. And then we send them back to load them with ballast.

Q Is this ballast being loaded in the train cars?

A Being loaded in.

Q And is this train, basically, delivering ballast in the train cars?

A Right.

Q Now, you and your gang, when you unloaded ballast in March of '93, is this the kind of thing you did?

A That's kind of the way we did it.

Q And what is this showing here?

A Showing them unloading ballast.

Q Okay. Now, there's a lot of mechanized vehicles here. What is this? Is this the T and S gang?

A That's the T and S gang.

Q All right. This is the kind of thing that would have been done, if it had come through Burkeville?

A Right. Right.

Q All right. What is that?

A That's ballast right here. That's a broom sweeping the ballast after the

Tr.203

ballast regulator regulates it.

Q Is this T and S type of machinery?

A That's what they call a cherry picker. We have that.

Q Now, what is this, Mr. Trimiew?

A That's a ballast regulator.

Q Is this the kind of thing you're saying was in Burkeville?

A Was in Burkeville.

Q And what are they showing here?

A They're showing the way they plow ballast when the tamper comes through and tamps.

Q Was the machine in Burkeville, something like that one?

A Something like that one. It might not be as used as that one, but it was something like that one.

Q Is these other pictures of a ballast regulator?
A Other pictures of a ballast regulator.
Q What is this right over here?
A The way you put down -- you put the ballast in the truck.

Tr.204

Q Okay.
MR. SHAPIRO: I think that's it.
THE COURT: All right. You can have a seat.

BY MR. SHAPIRO:
Q You can resume your seat, Mr. Trimiew. Thank you.

NOTE: At this time, the video is concluded; whereupon the proceeding continues, as follows:

BY MR. SHAPIRO:
Q Let me turn your attention back to you on that ballast on August 20, 1993. What did you and Mr. Forsythe do right after the accident happened? What happened next?
A What happened next?
Q Yes, sir.
A We put the bush hog -- I mean, the bush ax back in the truck and came to Richmond.

* * *

Tr.231

* * *

CROSS-EXAMINATION
BY MR. KOZAK:

Q Good afternoon, Mr. Trimiew.

A Good afternoon.

Q In your, about 20 years or so, that you worked on the railroad, you worked around the ballast, didn't you?

A Yes.

Q And you had walked on ballast before, during that 20 years?

A Yes.

Tr.232

Q And you had walked on ballast after it had been unloaded and before it was groomed, hadn't you?

A After it had been groomed.

Q You never, in 20 years on the railroad, ever walked on ballast that had not been groomed?

A Once in a while. But, not -- most of it, I would be either walking on it when it's been groomed. Most of the time, when the ballast hasn't been groomed, if you got anything in a bad place, they ought to -- they usually put a footing on it.

Q But, when you walk on the ballast after it was unloaded, before it had been groomed, is it more difficult to walk on it?

A Yes.

Q And, when you were helping to unload the ballast in March of 1993, that wasn't the first time that you had helped unload the ballast, was it?

A No. No, it was not.

Q What would you say, maybe six, seven times before that that you helped unload

Tr.233

ballast?

A Probably more than that.

Q Was unloading ballast something that was common for track laborers in your position, to help when it occurred?

A To help unload it?

Q Right.

A Yeah.

Q And did you help at all with the T and S gang when it came through?

A No.

Q Now, during the time that the ballast was unloaded and before the T and S gang came through, the ballast would be high along the rail, isn't that right?

A Right.

Q And that would have -- that would be like that for a month or two months, or whatever it was, until the T and S gang came through, right?

A Sometimes.

Q But, in any event, during that period of time, whatever time it was, it was not unusual for the ballast to remain high between the time it was unloaded and whenever the T and S gang

Tr.234

came through, right?

A Say that again?

Q It was not unusual for the ballast to remain high, between the time that it was unloaded, and the time, whenever it was, later that a T and S gang came through?

A Most of the time it was being high.

Q Right. And when you were stepping down into the ballast, when you slipped, you said you looked down on the ground before you stepped down?

A I looked down before I stepped down. Yes.

Q And surely you saw the ballast there that you were stepping down into, didn't you?

A Yes. But, when I -- when Mr. Forsythe stopped the truck, he went over to cut the bush, and I stepped down. And that ballast just went from under me, like, if you were to step on a pile of marbles. I mean, there wasn't any way in the world that -- when I went down, that's when something popped in my back.

Tr.235

Q But, before you stepped down into it, you saw the ballast that you were stepping into?

A Yes, I saw the ballast.

Q And when you stepped out of the truck -- I might have missed this. I wasn't quite clear. But, you stepped out of the truck, you stepped out frontwards, right; facing forward?

A Yeah.

Q And you put your right hand on the rail?

A Yeah. I caught it by the rail.

Q And you put your left hand on the door?

A On the door.

Q And then you had two feet on the step?

A Yes. Two feet on the step when I went to step down.

Q And, so, as you were stepping off -- and then as you were stepping off with your left foot, you let go with your right hand, right?

A My right hand wasn't quite --

when I stepped down, my -- I hadn't got a hold all the way to the iron -- to the grip for the step down. But, when I stepped down the ballast went from under my feet and I kept on walking.

Q But, at the point you were stepping down with your left foot, you let go of the grab hold with your right hand, didn't you?

A Yeah -- no, I didn't -- yes.

Q So, as your left foot was touching the ground, the parts of your body that were -- you had the right foot on the step and you had the left foot on the window, right.

A Right. But my foot didn't never touch the ground.

Q Excuse me?

A My feet did never touch the ground. It touched the ballast, and that's --

Q Right. Right. Touched the ballast. Now, you recall, don't you, that several months or so before you slipped that Mr. Palmer, who was the track supervisor, had demonstrated getting on and off the back of a gang truck. You remember that, don't you?

A I remember demonstrating getting off the back of a gang truck, yeah.

Q But you remember that demonstrate?

A Yes.

Q And during that demonstration, Mr. Palmer demonstrated getting down off the gang truck, maintaining three points of contact. Do you remember that?

A No.

Q You don't ever remember --

A Never remember no three point contact.

Q Well -- but the way he demonstrated it was, you were on the back of the gang truck and you have a hand hold with your left hand, right, with the bar on the back of the gang truck?

A Yeah. A bar on back of the gang truck.

Q That's how he demonstrated it, right? You grab hold with the left hand on the back of the truck --

A Grab hold with your left hand.

Tr.238

Yeah.

Q And with your right hand --

A He never told -- he never told -- talked about no three point stand.

Q I know. I understand that. But, I'm just asking what he actually did demonstrate to you.

A He showed us -- told us. Showed us how to get up in the truck, the gang truck and get back out.

Q Right. And I'm asking you how he showed you to get out.

A Put your hand up and your feet and step on up into the truck.

Q When you step off the -- you have both your hands holding at some point on the truck, right?

A Yeah. And then you step back down.

Q You put one foot down on the ground, right?

A Right.

Q So, at that point you have three points of contact. You have one hand -- both hands on the truck, one foot on the truck, one

Tr.239

stepping down, right? I mean, that's the way he demonstrated it, isn't it?

A Yeah. But, not on the high rail.

Q I understand that.

A Not on the high rail that I got hurt on.

Q And he also demonstrated how to get off facing the truck, right?

A Off a gang truck.

Q Well, a gang truck. And you don't recall during that demonstration, Mr. Palmer said -- demonstrating and saying, this is the way you should get off all types of equipment?

A No. No. Never.

Q Would you agree, as a matter of just common sense and safety, that it is safer to just get off a high rail vehicle, facing the vehicle backwards, then it is facing forward?

A I believe it would be just the same, one way or the other. Because, when you get off facing the outboards, you're looking down, and see where you're stepping. I mean, when you turn around backing out, you don't know if you're going to

Tr.240

step on a snake, or anything.

Q Have you ever got off a ladder before, Mr. Trimiew?

A Right.

Q You get off a ladder backwards, don't you?

A You have to. Common sense will tell anybody that.

Q Yes, sir. When Mr. Forsythe stopped the high rail to cut the tree branch down, what side of the track was the tree on?

A On his side.

Q On his side?

A Yeah.

Q Did he have to go around to the back of the truck to get any tool, or anything?

A He had to go around and get that -- I believe he had -- I don't know. I don't know whether it would be -- the blade was in the back of the truck, or if he had to go around back to get it. I can't remember.

Q So, when he got out of the truck, he might have had to go around to the back of the truck?

A Sometimes he would stick it in

Tr.241

the side, behind it in the back of it.

Q All right. The track from Burkeville back up towards Richmond runs north and south, right?

A North and south.

Q And, so, where you were on the passenger side of the high rail, you would be riding up on the east side of the track, right?

A Who?

Q You. If you're riding north in the high rail vehicle, and you're in the passenger side --

A I guess you call it --

Q -- you would be on the east side of the track?

A I guess you call it the east side.

Q Do you -- after this incident where you slipped in the ballast, the railroad charged you with a Rule Violation for the way you got off the vehicle, didn't they?

A You call that charging with a rule violation? I don't think that's -- It wasn't no rule violation.

Q Well, you were charged with a

Tr.242

Safety Violation or something?

A Safety violation. But, there wasn't nobody to demonstrate to me how to get out of the high rail.

MR. SHAPIRO: Your Honor, just to interpose our continuing objection to that line.

THE COURT: Yes, sir. I understand your objection. It's overruled.

BY MR. KOZAK:

Q And as a results of that, you were disciplined or suspended for a period of time?

A That's what they say.

* * *

Tr.244

* * *

THE COURT: Mr. Hajek, who is your next witness, sir?

MR. HAJEK: Mr. Palmer, Your Honor. And I have another request for admission, as well, Your Honor. I have another request for admission that I'd like to read to the jury.

THE COURT: All right. We can have Mr. Palmer come up to the witness stand, since he's in the courtroom. Mr. Palmer, you can have a seat for a minute and then I'll swear you in. Mr. Hajek, has -- how many?

MR. SHAPIRO: They all concern the same document.

THE COURT: Mr. Hajek has some more statements that the defendant has

Tr.245

admitted are true. These are some more admissions that the defendant has made.

MR. HAJEK: "That the attached document Exhibit 1 is a true, genuine, and an authentic copy of a document entitlement "maintaining track stability". It was produced by the defendant. It is maintained by the defendant as an official company document. And it is a railway business document which was brought by the defendant railway and has been in effect on the railraod [sic] at least as early as January 1, 1992. And I would move to admit, Your Honor, Norfolk-Southern Railway Standard Procedure Number 390.

THE COURT: Any objection, Mr. Kozak?

MR. KOZAK: No, your Honor.

THE COURT: That will be admitted as Plaintiff's Exhibit 16.

NOTE: The above-referred-to Standard Procedure 390 was marked and filed as Plaintiff's Exhibit No. 16.

Tr.246

THE COURT: Now, are you ready for Mr. Palmer?

MR. HAJEK: Yes, Your Honor.

STEPHEN PALMER, a witness having been called upon by the plaintiff, and having been duly sworn, testified as follows:

MR. HAJEK: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. HAJEK:

Q Would you please state your name and address.

A Stephen L. Palmer. 4116 Foreman Way, Hephzibah Georgia.

Q And you're employed by Norfolk-Southern?

A Yes.

Q And you have been since 1985?

Tr.247

A Yes.

Q You're a track supervisor?

A Yes.

Q Do you have a college degree?

A Yes.

Q In what field?

A Civil Engineering.

Q And are you licensed as an engineer?

A I don't have a professional engineer's license. No.

Q How long have you been a track supervisor at the railroad?

A Eight years.

Q And you came to Richmond in 1991 for Norfolk-Southern?

A Yes.

Q And Clinton Trimiew is one of the employees you supervised?

A Yes.

Q What area were you responsible for as a track supervisor, when you were in the Richmond area?

A The Richmond District, covering Burkeville to West Point.

Tr.248

Q And what were your general duties?

A To maintain and inspect the railroad within Norfolk-Southern and FRA Guidelines.

Q Before August 1993, Mr. Trimiew worked in your area on a regular basis?

A Yes.

Q You weren't aware of any prior back problems involving Mr. Trimiew?

A No.

Q In fact, he had no trouble performing his job duties for you?

A No.

Q His duties included heavy work and lifting up to a hundred pounds on occasion?

A Yes.

Q As far as you know, he was fully capable of performing his job on a full time basis before his injury in August 1993?

A Yes.

Q You observed him at work?

A Yes.

Q You took no exception to the way he performed his duties?

Tr.249

A No.

Q You even observed him getting in and out of high rail trucks?

A Yes.

Q And you took no exception to the way he got in and out of a high rail truck?

A No.

Q You never took him aside and said, this is the way you should be getting in and out of a high rail truck?

A We had -- we did have a discussion about that, as far as getting in and out of vehicles.

Q You never took Mr. Trimiew aside and said --

A No.

Q -- this is how you should do it?

A No.

Q You gave Mr. Trimiew training with safety presentations?

A Yes.

Q And you keep a record of those presentations?

A Yes.

Q In fact, there's a computer

Tr.250

printout that you can obtain of Mr. Trimiew's safety training?

A Yes.

MR. HAJEK: Your Honor, if I may approach the witness, I will hand him the document.

THE COURT: All right. Make sure you show Mr. Kozak the same.

MR. HAJEK: I've provided Mr. Kozak a copy of the same.

THE COURT: I just want to make sure he knows which document you're showing now.

MR. KOZAK: Thank you, Your Honor. I have seen it.

THE COURT: All right. Go ahead.

BY MR. HAJEK:

Q Mr. Palmer, do you recognize that document?

A Yes.

Q And that's Mr. Trimiew's safety training record?

A Yes.

MR. HAJEK: Your Honor, we'd move to admit that.

Tr.251

THE COURT: Any objection, Mr. Kozak?
MR. KOZAK: No, Your Honor.
THE COURT: That's Plaintiff's Exhibit 17.

NOTE: The above-referred-to safety training record was marked and filed as Plaintiff's Exhibit No. 17.

BY MR. HAJEK:

Q You're familiar with that safety record of Mr. Trimiew?

A Yes.

Q And you know that in that safety record there aren't any presentations concerning the mounting and dismounting from the cab of a high rail vehicle?

A Not on that, no.

Q Or from any vehicle?

A I don't follow.

Q In that document --

MR. HAJEK: And, Your Honor, if I could just have that document again.

BY MR. HAJEK:

Tr.252

Q As you look through that document, there aren't any presentations concerning mounting and dismounting from any vehicles?

A No.

Q In fact, the railroad had no written rules in its Rule Book concerning the mounting and dismounting from vehicles?

A No.

Q You know what ballast is?

A Yes.

Q And as part of your training, you have to know the procedures regarding the way ballast is laid down and groomed?

A Yes.

Q And there are certain safety standard procedures on the way ballast is groomed?

A Yes.

Q The ballast regulator is the machine that grooms the ballast?

A Yes.

Q And it should be groomed to restore full ballast section; which means, it's six inches out from the edge of the tie, and then it begins to slope to the ground?

Tr.253

A That is a full standard section.

Q Let me hand you another document entitled Norfolk-Southern Corporation Standard Procedure Number 20. I'll ask you if you're familiar with that?

A Yes.

MR. HAJEK: Your Honor, we move to admit that as Plaintiff's next exhibit.

THE COURT: Any objection?

MR. KOZAK: No, Your Honor.

THE COURT: That will be Plaintiff's 18.

NOTE: The above-referred-to Standard Procedure 20 was marked and filed as Plaintiff's Exhibit No. 18.

BY MR. HAJEK:

Q Based on your familiarity with those standard procedures, when the ballast is groomed, it should be level with the cross tie on the track?

A The ballast is generally groomed level with the level of the cross tie, yes.

Q And it's not supposed to be

Tr.254

higher than the level of the cross tie?

THE COURT: That's redundant. Come on.

BY MR. HAJEK:

Q When the ballast is higher than the level of the cross tie, it makes for a difficult walking surface?

A Yes.

Q And that is a safety consideration that you, as a supervisor, would want to watch out for, when your employees are faced with it?

A Yes.

Q And that's because ballast is a known hazard for railroads?

A Walking in ballast is difficult, period.

Q Now, in early 1993, a ballast train dumped ballast near Burkeville on your district?

A Excuse me?

Q In early 1993 --

A Yes.

Q And that ballast was dumped in anticipation of a T and S gang coming through the

Tr.255

area?

A Yes.

Q And you were the supervisor on site?

A Yes.

Q The ballast was frozen when it was unloaded?

A Yes. It was partially frozen.

Q It came out in large chunks?

A Some of the did, yes.

THE COURT: We're going over testimony that we've heard before, Mr. Hajek.

MR. HAJEK: Thank you, Your Honor. I'll move on.

THE COURT: All right.

BY MR. HAJEK:

Q You learned in April or May 1993 that the T and S gang was not coming through after the ballast had been dumped?

A Yes.

Q And your understanding was that they were not coming through because of budget reasons?

A Yes.

Tr.256

Q It had been decided to have them come through the next year, or possibly the year after that?

A Yes.

Q And, in fact, they didn't come through until 1995?

A That's correct.

Q Did you have a ballast regulator in the Richmond District, at that time?

A No, sir.

Q There wasn't one located in Burkeville?

THE COURT: He just said no. Three or four other witnesses said that there was, and you're going to keep

on asking every witness. Now, we have a contradiction. But, go ahead. You can ask him the question again, Mr. Hajek.

MR. HAJEK: Well, he is the supervisor, Your Honor.

THE COURT: I understand.

MR. HAJEK: I will move on.

THE COURT: I don't know why you think the jury, after hearing it from four

Tr.257

witnesses that there was one, why you think that they don't believe that there was one.

MR. HAJEK: I don't either. Thank you, Your Honor.

THE COURT: Come on, Mr. Hajek. Let's go.

BY MR. HAJEK:

Q Were there ballast regulators in adjacent districts?

A Yes.

Q Could you have them groom the ballast, if you wanted to?

A I didn't have control of them.

Q You have the right to write work assignments in your district?

A Yes.

Q Including in 1993, those of Mr. Trimiew?

A That's correct.

Q You weren't present at the time that Mr. Trimiew was injured?

A No.

Q And you didn't go to the scene, because you didn't know exactly where he had been

Tr.258

hurt?

A I didn't go to the exact scene, no.

Q He did tell you that he slipped on ballast and fell?

A Yes.

Q And you knew the general area where he fell, because there was high ballast there?

A Yes.

Q And you believe that that high ballast contributed to cause Mr. Trimiew's injury?

A It could have, yes.

Q He also reported to you that he felt a pop in his back when he slipped?

A Yes.

Q And you reported that to your supervisors?

A Yes.

Q And two days later you took Mr. Trimiew to the hospital?

A Yes.

Q Did you see him get the pain shot administered by the doctor?

A Yes.

Tr.259

Q And he never came back to work, did he?

A No.

MR. HAJEK: That's all I have, Your Honor. Thank you.

THE COURT: Is there any cross-examination?

MR. KOZAK: Yes, Judge.

CROSS-EXAMINATION

BY MR. KOZAK:

Q Mr. Palmer, how often do you have safety meetings with your gang in Richmond, or did you when you were in Richmond?

A We have official safety meetings on every Monday morning. But, we have small safety meetings every morning.

Q Is every safety meeting that you have with the gang recorded on this safety record?

A No, sir.

Q Do you recall giving a demonstration during the summer of 1993 to the gang on how to mount and dismount a gang truck?

A Yes.

Q When was that demonstration given?

Tr.260

A It was in, actually, about February of '93.

Q And was it given at one of the weekly safety meetings?

A Yes.

Q Was that recorded on this safety history?

A No.

Q Was Mr. Trimiew present for that demonstration?

A Yes.

Q Can you tell us what you demonstrated?

A I demonstrated to Mr. Trimiew, and all the rest of the people; track maintenance crew at Richmond, the proper mounting and dismounting procedures for vehicles, or other rail equipment, and the like.

Q All vehicles, or just the gang truck?

A Well, I demonstrated on the gang truck. But, I stipulated that it would be -- that procedure would be for all types of vehicles and rail equipment.

Q What was the procedure that you

Tr.261

demonstrated?

A The procedure I demonstrated was to maintain three points of contact, at all times. And not to release the hand hold, until you are

Q What is meant by "three points of contact"?

A Three points being -four points would be two hands and two feet. And three of those would be in contact with something; either the ground, or a point on a vehicle, or rail equipment, at all times.

Q Did you demonstrate that yourself?

A Yes, I did.

Q Did you have the members of the gang demonstrate it, individually?

A Yes.

Q Did Mr. Trimiew demonstrate that?

A Yes

Q Did he get off the gang truck properly, at the demonstration?

A Yes.

Q Had you -- did you see Mr. Trimiew, on other occasions, get out of the high

Tr.262

rail vehicle properly?

A Yes.

Q You indicated to Mr. Hajek that the ballast in the area where Mr. Trimiew stepped out, could have

contributed to this. Is there anything else that could have contributed to this slip?

A The fact that he did not maintain a firm hand hold, or three points of contact, when getting off the truck. Okay. And, in fact, did you cite him for that?

A Yes.

* * *

VIRGINIA:

IN THE CIRCUIT COURT OF
THE CITY OF RICHMOND

JOHN MARSHALL COURTS BUILDING

CLINTON TRIMIEW,
Plaintiff,

VS.

NORFOLK-SOUTHERN RAILWAY COMPANY,
Defendant.

CASE NO. LA-520

Taken on: December 8, 1995

Complete transcript of testimony and other incidents in the above, when heard on December 8, 1995, before the Honorable R. G. Johnson, with a jury.

APPEARANCES:

WILSON & HAJEK, ESQS. 1294 Diamond Springs Road; P.O. Box 5369; Virginia Beach, Virginia 23455. Taken By: Richard H. Shapiro, Esq., Counsel for the Plaintiff. WILSON & HAJEK, ESQS. 1294 Diamond Springs Road; P. O. Box 5369; Virginia Beach, Virginia 23455. Taken By: Francis P. Hajek, Esq., Counsel for the Plaintiff.

MALONEY, BARR & HUENNEKENS, ESQS. Sovern Center; 111 E. Main Street; Richmond, Virginia 23219. Taken By: Fred R. Kozak, Esq., Counsel for the Defendant.

Tr.80

* * *

DIRECT EXAMINATION
BY MR. KOZAK:

Q Good morning, Mr. Forsythe.

A Good morning.

Q Could you introduce yourself, please, to the ladies and gentlemen of the jury?

A I'm Robert Forsythe. I'm an assistant track supervisor with Norfolk-Southern Corporation.

Q How long have you worked for the railroad?

A Fourteen years.

Q And what is your position with the railway?

A I'm an assistant track supervisor. I share some duties with the track supervisor. And my territory is the Richmond District, which runs from Burkeville, Virginia to West Point, Virginia.

Q Did you start with the railroad

Tr.81

as a supervisor?

A. Started as a laborer in September of 1981.

Q When did you first meet Mr.Trimiew?

A In 1981. He was working in Richmond when I was hired. And I was hired to work in Richmond.

Q Did you work with Mr. Trimiew?

A Yes, I did.

Q As a laborer?

A Yes, I did.

Q When did you become a supervisor?

A I was promoted to this job in January of 1988.

Q As part of your job as a track supervisor, what -- does the railroad send you to any schools, or give you any training to do that job?

A Yes. The railroad has a school in McDonough, Georgia, at which facility they do various trainings. And training for assistant track supervisor is among their programs.

Q Are you tested --

A Yes.

Tr.82

Q -- on what you're taught at these training sessions?

A Yes.

Q And how have you done on your tests?

A Perfectly well.

Q What are your duties, generally, as an assistant track supervisor?

A The primary duty of the assistant track supervisor, is the inspection of the railroad; both for compliance with the railroad standards, and the standards set out by -- set down by the Federal Railroad Administration.

MR. KOZAK: Could we hand the witness Plaintiff's Exhibits 16 and 18?

THE COURT: 16 and 18?

MR. KOZAK: And 18.

BY MR. KOZAK:

Q All right. Mr. Forsythe, you have -- first of all, do you have a document that's labeled Plaintiff's Exhibit 16?

A Yes, I do.

Q And is that a Norfolk-Southern Railway Standard Procedure on maintaining track stability?

Tr.83

A That's correct.

Q And the other document, you have, Plaintiff's Exhibit 18, is that a Norfolk-Southern Procedure on ballast?

A Yes, it is.

Q Are these procedures something that's covered in the schools that you go to?

A The Standard Procedure 390 is covered annually, as a part of a preparation for the hot weather; the onset of hot weather. The --

Q Well, just for a second. The 390, which one is that?

A This is maintaining track stability.

Q Okay. How about the other one?

A And Standard Procedure 20 is one that's available to us in our offices, if you need to refer to the Procedure for guidance in performing certain tasks. Those procedures are available in each office; the track supervisors office.

Q Is there a difference between rules and standards and procedures on the railroad?

A Yes, there are. Standards, or

Tr.84

the procedures are guidelines for performing the work, and setting down the parameters within which we operate. he rules, generally, govern the ways we go about doing the work. The cautions that we should understand. In some instances, it will be close. Say, in obtaining track time. There's an instruction on how to go about properly obtaining that track time. But, there's also a rule governing the proper way in which you could do that.

Q Now, you're familiar with the ballast the -- of the ballast that was unloaded in the Burkeville area in 1993?

A Yes, I am.

Q Did you participate in that unloading process?

A Yes, I did.

Q And you were with Mr. Trimiew, on August 20, 1993, in the high rail vehicle when he stepped out and slipped?

A Yes, I was.

Q Was the ballast on the track that

Tr.85

Mr. Trimiew slipped on, in August of 1993, improper in relation to the procedures that you just talked to us about, of the ballast and the track stability?

A No, it was not.

Q Why? Why was it not? Why is that?

A Well, it fell well within the parameters of -- that you would expect with the normal unloading of ballast.

Q How so?

A Ballast is unloaded from the side of a fifty car train. You lay down a berm of ballast on the head of ties, or heads of the ties. And that berm of ballast is, generally, going to be eight to twelve inches above the top of the rail, as it's laid out. And the ballast that was laid out by that train was well within that estimate.

Q But, isn't that ballast under the normal procedure at some point supposed to be regulated after a T and S gang comes through?

A That's correct. The ballast is laid down in advance of a timbering, surfacing job.

And as the job is concluded, the ballast is regulated back to the prescribed profile. And that's how it should be left, after the job is completed.

Q Well, in this particular case, there was a T and S operation scheduled for the summer of 1993?

A That's correct.

Q And that did not go through before Mr. Trimiew slipped?

A No. No, it did not.

Q So, was it improper to -- in relation to those procedures -- to leave the ballast as it was, after the T and S gang was cancelled?

A No. That would be a normal situation.

Q Why is that? Could you explain why that would be a normal situation?

A The timeframe between the unloading of the stone and Mr. Trimiew's fall; several months, five months, is well within the normal time that ballast, or ballast would be on the ground, in anticipation of the T and S gang

Tr. 87

process.

Q What's involved in scheduling a T and S process?

A The estimation of the division engineer, my boss, that the track is in condition, or in a condition, where it will be benefited by the introduction of new cross ties. And a new surface, which is the second part of the timbering and surfacing. When they put the elevation on curves. And maintain the plain of the rail, which maintains the track, straight track. So, it's the division engineers job to ascertain when a track is in need of timbering and surfacing. Generally, it's done on a cycle. This particular track is on an

eight year cycle. Or, if its condition warrants more frequently; if you're experiencing the deterioration of the ties at a more rapid rate than was anticipated.

Q On the day that Mr. Trimiew fell, you were -- you and he were driving in the high rail vehicle back up toward Richmond?

A That's correct.

Tr.88

Q And why -- can you tell the jury why you stopped the high rail?

A There was a small tree growing on the west side of the tracks that --

Q Now, let me stop you one second. When you say the west side --

A That would be the driver's side of the truck.

Q You're driving north. So, the west side would be the driver's side. East side would be Mr. Trimiew's --

A Mr. Trimiew's side. That's correct. The Federal Railroad Administration has a defect vegetation, brush and growing --

Q You had to stop to cut down a tree, right?

A That's correct.

Q Then what did you do after you stopped?

A I think I just mentioned to Slim that there was a tree that we had to cut.

Q Slim. Is that Mr. Trimiew's --

A Yes. Clinton. Excuse me.

Q You can call him Slim.

THE COURT: No, you have to call

Tr. 89

him Mr. Trimiew.

THE WITNESS: All right.

BY MR. KOZAK:

A I grabbed my hardhat, safety glasses, gloves and dismounted the truck. I went to the rear of the truck to get the bush ax. A small tree bush ax was all that was necessary to cut it down. I went around to the rear of the truck and I heard the sound of ballast skidding down the other slope that the ballast was on.

Q Did you see Mr. Trimiew getting out of the truck?

A No. I had already dismounted. I dismounted. Rounding the rear of the truck, I saw Mr. Trimiew in a seated position on the ballast, on the slope of the ballast, several feet away from the door of the truck.

Q Did he have his hardhat on?

A My recollection is that he did. My initial concern was that he may have struck his head, while falling, and was relieved to note that the hardhat was in place. And my recollection is that the hardhat was in place.

Q How long was it, about, from the

Tr.90

time you got out of the truck and went around to the back and heard the ballast slip, or fall?

A About five seconds. Ten seconds.

Q How long after that was it when you saw Mr. Trimiew?

A Another several seconds.

Q All right.

A Just up to putting the sounds together, with the possibilities. And felt that I needed to see what had taken place.

Q Did you see Mr. Trimiew fall down the slope?

A No, I did not.

Q Did you see his hardhat fall down the slope?

A No, I did not.

Q Did you see him putting his hardhat back on?

A No. I don't recall seeing him put his hardhat back on.

Q Did you say anything to him?

A Yes. I was concerned that he would be -- that he was all right. So, I approached Mr. Trimiew and asked him about his condition. Although, he was a

Tr.91

little flustered, I took it to be much embarrassment, as anything else. And he responded that he felt he was okay. And then after a brief hesitation, that he had felt something pop in his back. And I asked him to sit still and collect himself; just to inventory his own condition before attempting to move or join. Satisfied that he was, indeed, doing that and not attempting to get up to assist me cutting the tree, I went back and cut back the tree. It took but just a few slices of the bush ax. And then returned to see how Mr. Trimiew was doing. He had risen and had made his way to the back of the truck, and was standing on the rail, or the track. As I finished, then we --

Q And then what did you all do after that?

A Remounted the truck and proceeded north, back towards Richmond.

Q Did you make any more stops, along the way?

A We stopped once in Amelia. A

Tr.92

similar situation, this time bamboo that had begun to lean over the tracks. And Mr. Trimiew, again, indicated he was feeling a little stiff, and --

THE COURT: Excuse me, just one second. I hate to interrupt. We're going to have to take a brief recess.

We're going to take a five minute recess. You have to stay with me, sir. You just have to stay awake, okay? We've come to far in this case to call it all off. And I'd have to do it if you don't pay attention to the testimony. I don't mean to embarrass you, you have to keep your eyes opened and let me know that you're with me. We're going to take a five minute recess. Go put some water on your face. We'll stand in recess until 12 o'clock. We'll get started in about five minutes. We'll stand in recess until 12 o'clock.

NOTE: At this time, the jury exits the courtroom and a brief recess is had; following which, the proceeding

Tr.93

continues, as follows:

THE COURT: You're ready to start again?

MR. KOZAK: Yes, Judge.

THE COURT: I'm sorry we had to interrupt you on direct examination, Mr. Kozak, but I thought I had to.

NOTE: At this time, the jury returns to the court room; whereupon, the proceeding continues, as follows:

THE COURT: Mr. Kozak, you may continue.

BY MR. KOZAK:

Q Mr. Forsythe, going back to the ballast unloading operation of March of 1993, was there anything unusual about that, particularly, as far as any icy conditions that affected the unloading of ballast?

A Yes. It was a very difficult train. The west side especially had ice on the doors, up in the rocks, it forms a matrix. The ice has to be broken up

before the rock will flow from the door. The train had been stored inside Green Bay previous to our picking it up. And the west side of the train had been in the shade. The east side of the train had gotten a little sunlight, passing solar beams, heating that side. So, it had fallen somewhat. But, the west side of the train was very difficult to unload.

Q How was the unloading from the east side of the train?

A My understanding was that from all of the slamming and banging that we were doing on the west side of the train, made their side fairly routine. We were actually dislodging any ice that was in their doors, by our activities on the opposite side of the train.

Q Which side of the track did Mr. Trimiew slip in?

A He was on the east side.

Q Between the time the ballast was unloaded, in March of '93, and when Mr. Trimiew slipped in August of '93, did you and he ride back

and forth through that area of track on occasion?

A Yes. Yes. Like I said, Mr. Trimiew rode with me on the track inspection scheduled for that end of the railroad twice a week, orderly. And then during the summer months, when it's hot, that's everyday. We have an interest when it's above 90, so that you can monitor the effects of the heat on the rails and it's a matter of record. So, frequently.

Q Were there any occasions during that period of time when Mr. Trimiew got out of the high rail vehicle, into the ballast that had been unloaded?

A We're required by the Federal Railroad Administration to make walking inspections at all switches

monthly. And there's a certain type of bar, a joint bar on the railroad car, a compromise bar, where you go from one size railroad to another. They were required to inspect weekly. Once that compromise bar, ties and switches within the area, in which the ballast has been unloaded, and then a number of just routine stops, similar to the cause for stopping

Tr.96

that day; vegetation rubbing the sides of trains, loose bolts on a jointed rail headed south, it's just routine stops. It's not an area where we will be dismounting everyday, but a number of times during that time period. Yeah.

Q What's a switch?

A A switch is where you go from one track to another. On this particular stretch of railroad, the switch will go from the main line to a siding; various types of siding.

Q When the ballast train goes through to unload ballast, does it unload ballast through the switches?

A You don't want to unload quite as much in the switch, because you have to be able to move the point from one side to the other. You don't want to have rock behind the points. And you need to leave the area a little more accessible to the train. You would be dismounting the trains to throw the switch. Generally, what is called the turnout side, which is the side that you would go into the siding; via, the ballast is cut back and you can almost close the doors on the side where

Tr.97

you do not cross over the turnout track. The amount of ballast is generally slight. You can unload through that side of the switch, without cutting back on the door, a great deal.

Q And when Mr. Trimiew, on the occasions when he would get out to inspect the switches, would he have to go through that area of unloaded ballast?

A He would have to be aware of it. Yes.

Q Okay. What's involved in changing the combine?

A A compromise bar?

Q A compromise bar. I'm sorry.

A It's a bar that's a little bit more fragile, a little bit more breakable than the ordinary joint bar, because of the step within the bar, the casting. So, we inspect them weekly for cracks. And if a crack is found, the bar is removed and a new bar is applied. It's a matter of removing four bolts and applying a new bar.

Q Okay. Thank you, sir.

MR. KOZAK: That's all I have.

Tr.98

THE COURT: Cross-examination?

CROSS-EXAMINATION
BY MR. SHAPIRO:

Q Good afternoon, Mr. Forsythe. How are you?

A I'm fine.

Q We have met before in your deposition, haven't we?

A Yes, we have.

Q Mr. Forsythe, if I understood you correctly, you said that the ballast that was dumped in that Burkeville area in March was about eight to ten inches over the top of the rail level, if you're looking from the side; right?

A Roughly. It will range -- well, eight to ten, actually, is going to e on the high side. But, yeah, it can be that far above the level of the rail.

Q That's what you told Mr. Kozak, isn't you?

A That's correct.

Q And if the ballast can be that high all the time, the railroad doesn't need those procedures or standards that they have, do they?

Tr. 99

A I'm sorry, could you rephrase it or say it again?

Q Well, I thought that you said just now to Mr. Kozak that there was nothing improper about ballast eight to ten inches above the rail. Is that what you said?

A That's correct.

Q Well, even throughout those procedures and standards that talk about smoothing the ballast, can't we, if that's fine?

A Sure.

MR. KOZAK: This is argumentative.

THE COURT: This is. It is argumentative. Objection sustained.

MR. SHAPIRO: All right. Your Honor, if I could use one of these exhibits here, please.

BY MR. SHAPIRO:

Q Mr. Forsythe, I want you to take a look at this. Can you see those red lines?

A Uh-huh.

Q Would you agree that those red dotted lines would be simulating ballast in the Burkeville arear [sic]?

Tr.100

A Correct.

Q And would you agree with me, that it certainly is easier for workers who are walking along the

margins outside the rail, to walk on a smooth, flat surface than a surface that has mounds of ballast, wouldn't you?

A Yes, I would.

Q And the railroad has those procedures and standards and they say that when it's properly groomed, it's supposed to be flat with the cross tie?

A That's correct.

Q Now, you and Mr. Palmer knew by, I think you've testified, April or May of '93 that the T and S gang was not coming through that Burkeville area, is that correct?

A That's correct. I don't recall the exact date when the job was cancelled, but that's going to be a ballpark.

Q And a ballast regulator could have come through that area and smoothed it, any time after the T and S gang was cut off, couldn't it?

A Providing the ballast regulator was available for that job and how that particular

Tr.101

job would be arranged as a --

Q And that was Mr. Palmer's duty, most of the time, to assign the work on the district, correct?

A That would be correct.

Q Well, when he wasn't around, you had the authority, didn't you --

A That would be correct.

Q -- to order work assignments?

A Excuse me?

Q To order work assignments in his absence?

A That would be correct.

Q There's a map here -- well, let me ask you this: You said that -- is it your testimony that the ballast was not frozen one side of the ballast cars, but one side was frozen?

A The -- yeah. The side of the train which had been in the shade, had not received the benefits of passage of solar heating, and was more thoroughly frozen than the other side.

Q But both sides had some frozen stone, Mr. Forsythe, you'd agree with that, won't

Tr.102

you?

A My understanding is that they weren't having a great deal of difficulty from unloading the ballast from the east side of the terminal.

Q Well, you drove through that area and you observed mounds of ballast on both sides of the rail, didn't you, from time to time, after the ballast was dumped in that area?

A The variance in the height of the ballast that's unloaded from a moving train, shouldn't be a surprise.

Q And you saw it. And there was mounds on both sides of the track, weren't there?

A The speeds of the train varies. The locomotive engineer can't hold the speed of the train constantly. The door has to be opened and closed to regulate the flow of stone. If the train slows down, when the operator of that door is away from his door, the ballast is going to build up. It's an unavoidable part of the operation.

Q And you were aware that because of the peculiar circumstances of the frozen

Tr.103

ballast, that the doors had to be opened wider than usual, isn't that true, on the trains?

A One, the situation of having ice in ballast is not that peculiar. And, two, once you get the ballast to flow,

the doors won't be opened more than usual, they will be opened enough to regulate the flow of stone to the desired height of the berm, if you're trying --

Q You were out there that day, weren't you?

A Yes, I was.

Q You don't remember that the doors had to be opened wider than usual, because of solid chunks of stone?

A And then once you have the ballast flowing, you try to close the door down, if you can. It was a trying day. It was a very difficult train to operate.

Q And that train did not unload the rock over as long a number of miles as it was supposed to, did it?

A We fell about a mile short. We had seven hundred tons per mile. The ordinary

Tr.104

amount of stone for that type of job, with a T and S job, and the various conditions would be six hundred tons of stone per mile.

Q As a track inspector who had supervisory authority over work assignments, all those days that you drove back and forth from that Burkeville area, did you ever think to yourself about talking to Mr. Palmer and saying: You know, you ought to get that regulator that's nearby and smooth that rock. Did you ever think about that?

A Yes. The regulator, first, was assigned to the handling of lean ballast situations, which is where you do not have enough stone on the edge of the ties to satisfy that the track would be properly restrained. The regulator also was miss set by mechanical problems. The hydraulic drive went out on many occasions. So, we didn't have full use of the regulator everyday that it was on our territory.

And then as the priorities would go, if the stone was to be regulated down, it would be regulated down where it

had been noted by a trainman, or some other person; that there was

Tr.105

some difficulty in walking in an area where you could expect depth between traffic. On a stretch of mainline removed from switches, outside of a yard board, there are possibilities of, you know, someone having to get down and walk. And Slim and myself are good examples of that. But, it is not going to be a frequent occurrence. So, as you allocate the hours of usage for this machine, you are going to put the machine where it is more urgently needed.

Q Mr. Forsythe, the question is: Could the ballast regulator had done the job, sometime between March and August of '93?

MR. KOZAK: I'm going to object, Your Honor. I think he's answered the question.

THE COURT: Overruled.

BY MR. SHAPIRO:

A Is there any possibility? Is that --

Q Sure. That it could have done the job; smoothed that ballast.

A There may have been, with a

Tr.106

perfect scheduling of the use of the machine, and opportunity to do it. That assumes a perfect scheduling. And, also, observed an exigent need to facilitate the movement on that track by foot. Pardon me.

Q All right. Mr. Forsythe, you said that area where you all were walking wasn't an area that was walked often?

A No, it's not.

Q And you can't tell this jury for sure that you and Mr. Trimiew ever had to get out of that track inspector's truck in the area of 89.2 milepost, at anytime before that August 20, '93 date, from the time that ballast was dumped in March?

A Having been -- how do we describe the area, of the 89.2 --

Q That entire area --

A Is that the --

THE COURT: Wait. Wait a minute.

A Is that the --

THE COURT: Wait a minute. Wait a minute. Wait a minute.

THE WITNESS: I'm sorry.

Tr.107

Q Within the --

THE COURT: Wait a minute.

MR. SHAPIRO: Okay. I'm sorry.

THE COURT: Mr. Forsythe, you just have to answer the questions that Mr. Shapiro asks you. And if he asks you about specific mile markers, that's the question.

THE WITNESS: Okay.

BY MR. SHAPIRO:

A Had we descended at that location?

Q Yes.

A That exact location before that. No, I don't believe we had. I know we had not.

* * *

Tr.192

when you go back there. You can also take a look at the Safety Training Record. It is very interesting, because there's nothing about the three points of contact, or getting in and out of cabs, or walking on high ballast. That's been left out of there. Nothing in there at all.

So, you can go through that and take a look at all of that. The railroad really, when you look at all the evidence, had a condition here that was easily preventable. Mr. Shapiro told you that at the beginning of this case, that it was just easily preventable.

If they had put out warnings, bulletins, or if they had gone ahead and groomed the ballast, anything like that to correct the situation, then we wouldn't be here today.

Now, these are the witnesses the plaintiff called. And it's through these witness that we've proved our case to you. In response from the railroad, we heard from Mr. Forsythe and Dr. Lublin.

And , really, what these witnesses

* * *

Tr.196

inconvenience, to not be able to wear a pair of sneakers because you can't bend down to tie your shoe laces, that's more than just inconvenience. That's a horrible transformation of your life.

He's got a forty-six percent impairment of his body. I want to go back for one moment; to the negligence issue, because there's one other thing that you should consider when you're thinking about -- thinking about whether or not the railroad was negligent, or whether or not Mr. Trimiew was negligent.

And you should consider the position of the parties. What Mr. Trimiew's knowledge was and what the railroad's

knowledge was. Mr. Trimiew worked out there for a long time. He's done his job.

But, in comes Mr. Palmer. He's got a college degree in engineering. He knows about all these standards for ballast, and how it should be groomed; just level with the cross tie. But, he doesn't take the care to make sure all of

Tr.197

that is done. And Mr. Trimiew has paid the price. Mr. Trimiew is asking that you award him the full amount that he's sued for , in this case; eight hundred thousand dollars. And he's asking that you not reduce that for any contributory negligence on his part, because he hasn't told you there is any. He's told you he's done the best he could, under the circumstances.

So, please take the time to go through the instructions. Look at the exhibits, and remember that you are the conscience of the community. And it's your chance, now, to do what's right for Mr. Trimiew and for the railroad. Thank you.

No, I don't believe we had. I know we had not.

* * *

THE COURT: Mr. Kozak? It clips at the top.

MR. KOZAK: All right. Sorry. Ladies and gentlemen, thank you. I'd like to pick up on what Mr. Hajek said, when we're conscience. All right. Ladies and

Tr.198

gentlemen -- I'm sorry. I'd like to pick up on what Mr. Hajek said, as far as why we're now here today, and doing justice. And that involves being fair. And, obviously, to both sides. And, particularly, what it means is that the fact that Mr.

Trimiew suffered an injury -- which we don't deny -- is not sufficient in itself to justify an award. That's not the way our system works. Because, we also have the idea in our system of justice, that people need to be responsible for their own safety, to a certain extent. And that's why we have this whole idea of contributory negligence. And that's something we have less and less of in society today, I think, is people taking responsibility for their own actions.

In this particular case, Mr. Trimiew was a laborer of the railroad, for 20 years. Being a laborer on the railroad is a hard job itself, and it's a dangerous job.

Tr.199

And the railroad knows that. And that's why the railroad has weekly, perhaps, daily safety meetings. And the purpose of the safety meeting is to instruct the people that work there as to how to try to do their job the best, and safest way possible; in the midst of all this machinery, and all the other potentially dangerous things that are there. And this is reflected in the Court's Instructions. The Law recognizes this; that the Railway Company is not required to furnish a place to work that's absolutely safe. You can't do that. The duty of the railroad is to exercise reasonable and ordinary care, to provide a reasonably safe place for Mr. Trimiew to perform the work that he's performing. Now, the only thing that the plaintiff says the railroad did, and that was negligent in this case, is allowing the ballast to be unloaded and to remain on the track and Mr. Trimiew to fall. And

Tr.200

that's it. I mean, that's the only thing. You've been here for two days, and that's the only thing that the plaintiff says that we did wrong. Now, let's look at that. The purpose of unloading this ballast, is that it's part of an operation. It's not

an isolated thing. It's in anticipation of this T and S gang that comes in later to change the ties, do all these other things, and then the ballast is laid around it. Now, you saw the videotape that the plaintiff played of this T and S operation. This is a big operation. There's all kinds of equipment. It's something that involves a lot of men. It's something that takes place over time. And you can see in the process of that what happens first. If you remember the video, you get on the track and mark the ties that need to be changed. Then, sometime after that they unload the ballast along the way. Then

Tr.201

they come through with the replacement ties. And then they take the old ties out and place the new ties in. And then they come sometime after that with the regulator machine to smooth the ballast out, to provide stability and drainage for the tracks. Now, regulating the ballast is the last thing that is done in that operation. You've heard nobody come here and testify that ballast was ever regulated on the railroad before the T and S gang came through. Now, the plaintiff brought in a number of workers out there and, again, to say: Well, there's another regulator over on another track.

We could have brought that over. But, that's not what Mr. Forsythe said. And he's the supervisor. And I think an interesting thing that Mr. Hajek said, is that all the people that Mr. Trimiew worked with came in and said the same thing. They did

Tr.202

pretty much all come in here and say the same thing. And I think if you recall, most of them had something else in common. They were represented by the plaintiff's firm. And it wasn't -- it wasn't feasible. It wasn't the way the railroad

operates; in other words, to just bring a machine in, if it was even there. Mr. Forsythe said it wasn't there, in order to do this. It wasn't the way to operate. But, the people who worked on the railroad knew this. And they all had unloaded the ballast. Mr. Trimiew helped them unload the ballast. They knew it was there. They knew it was difficult to walk in. And it was something that they knew about. They work around it all the time. They were trained, particular, to deal with it. And particularly trained how to get in and out of vehicles on that ballast. That gets us to the three points

Tr.203

of contact idea. Everybody, I think, testified, including Mr. Trimiew, the co-workers had never heard of this three points of contact. But, they remember Mr. Palmer demonstrating the way to dismount off the gang truck. And the way that that demonstration was, demonstrated the three points of contact with the two hands, and the foot stepping down. So, they remember the demonstration. They remember it was getting off backwards. They remember the way it was actually done was to maintain three points of contact. But, they don't remember if that term was ever mentioned. Or that you were supposed to do it on all meetings. But, in fact, even it there hadn't been a demonstration, it's simply common sense that -- and Mr. Wynn was one of the witnesses for the plaintiff, and testified that it was just common sense that you need when you come up facing equipment, holding on, particularly this

Tr.204

vehicle that the plaintiff was in. And, particularly, when he not only knew the ballast was there, but he looked down at the ballast, saw it was there and then just like he was getting out of a car in his driveway, just stepped down into it. And

that alone was sufficient to have been the cause of this accident. And, in addition to that, there was testimony that -- Mr. Hajek said it wasn't a rule, but on the other hand, there was testimony that Mr. Trimiew was charged and disciplined by the railroad for the improper method in which he got off the high rail. And the instructions from the Court instruct you that you can take that into consideration in determining whether Mr. Trimiew was negligent. The way that the system is set up, we real only have two parts to this trial. One is:

Liability. In other words, were you decide who is negligent. And that portion, I think, that you know the

Tr.205

railroad's position, based on what's been proved, is that there hasn't been any negligence shown on the part of the railroad. And, unfortunately, this accident occurred as a result of Mr. Trimiew's actions. But, we -- obviously we had a lot of testimony. More than a lot of injuries. So, obviously, we have to address -- I have to address that with you here.

Mr. Hajek said that Dr. Lublin's testimony was so different than all the other doctors, I don't think it was. Dr. Lublin came in and acknowledged that, as I told you in the opening statement, that Mr. Trimiew slipped. There's no question about that. Then he had surgery after that. And that was, in part, as a result of the slip. Dr. Lublin was right up front about that. But, what Dr. Lublin went on to say, you know, what the plaintiff's doctors wanted to say was:

But, wait a minute. There's more

Tr.206

going on here than that. Mr. Trimiew, at the time he fell, was sixty-five. He had arthritis in his back. It started showing up in 1988. By the time -- Dr. Rubis said that when

he look at the films back from '88, he didn't see much arthritis. But all the doctors, plaintiff's doctors, agree that in 1993 he had extensive arthritis throughout his back. So, this was a condition that was getting worse. And as the doctors told you, arthritis is something that tends to get worse. And Dr. Lublin told you that as far as Mr. Trimiew's problems now, after the surgery -- now, the surgery helped him, as far as the herniated disk. I mean, that's why people have surgery; to get better. And, in fact, Mr. Trimiew was better after the surgery. But, he has the arthritis. He has arthritis in his hips. That effects his motion. And all these things you need to take into consideration in assessing if

Tr.207

damages are awarded; whether all of this is the responsibility of the railroad. Or, whether some of this is the result of a pre-existing, and other conditions, that has nothing to do with the railroad. It is not the railroad's fault. So, you have to take that into consideration, if you get to that point in the case.

I think I've covered it all and I won't use up all of my time.

THE COURT: Thank you Mr. Kozak.

Mr. Shapiro?

MR. SHAPIRO: Thank you, Your Honor. Could I take those exhibits, please?

THE COURT: Yeah. And whatever you're going to show the jury, I assume you've shown Mr. Kozak?

MR. SHAPIRO: Yes. These are blowups that were already entered in the case.

Ladies and gentlemen, I'm going to try to be brief. You've heard a lot. At the beginning of the case, we told you

Tr.208

this accident was easily preventable. And we've proven that.

We brought in the witnesses. The railroad didn't. They brought in one witness, Mr. Forsythe, who was the supervisor.

We've shown you clearly that the railroad could have prevented the accident. We don't think you're going to have any dispute about that when you get back in the room, though.

What's really happened and what Mr. Kozak said in his opening statement is, look, you're going to have to compare what the negligence was of Mr. Trimiew versus the railroad.

And as Mr. Hajek touched on, what's really gone on here in this whole trial is a damage control action by the railroad. It's been, let's control the damages, and just hope that jury doesn't really award him what they could award him. Because, we know he's really hurt.

Let's try to convince that jury when they get back there that it was his

Tr.209

fault. That's the plan. You can just see the railroad's claims people sitting around thinking about that and how they're going to argue this case.

But, you know, from the Request for Admissions that there was no rule about dismounting. Remember at the very beginning of the case, before Mr. McGinley ever opened his mouth, I read this to you all:

"Defendant maintains no written records, or written Safety Rule that specifies how a worker's arms and legs are supposed to be positioned properly while exiting a high rail vehicle. Admitted."

That's uncontested. And the second one is about the same. It's uncontested. They had not trained him. They charged Mr. Trimiew with a Rule violation? What was the rule?

We never heard one during the whole trial. It was the phoniest bologna in the whole world. They charged him because he was hurt and was going to make a claim against him. That's all that was

Tr.210

going on.

You saw this exhibit. You know what the mounds were like that were out there. And you have some photographs here of the scene of the accident. Mr. Trimiew took them. Look at these and you'll see how high the ballast was. That's taken from the side, looking up at the rail. And you can see the mounds up and down here in this picture.

There's a picture that the railroad put in, if you'll remember. This one. And what's great about this picture, is you see how it's supposed to look when you look at those cross ties, and it's flat.

The margin there is how it's supposed to be. The railroad took it in that view. But, if you look down the track a ways, you'll see where the ballast was in mounds. And that's where the accident happened.

Mr. McGinley was the first witness. And he really told you most of what you needed to hear. He's never been

Tr.211

represented by our firm.

But, we don't mind what MR. Kozak said about us having represented some of those railroad workers. We're proud to have represented the railroad workers. And I'll tell

you that without hesitation. It didn't affect their opinions, or testimony about anything.

Mr. Forsythe. You remember him? He was the one witness that the railroad brought on, who was the inspector with Mr. Trimiew. You all ought to remember exactly, when I asked him that question:

Did you think about bring [sic] the ballast regulator in there, since you drove through there all the time, as a supervisor?

There must have been ten different excuses he gave. And I just let it go, because you all knew exactly what was going on. He did not have an answer. He did not have an answer to the question.

So, really, when we're talking about fairness in this case, and being fair to both sides, I have to think to

Tr.212

myself as I address you, what is fair?

Well, fair -- it wasn't fair to Mr. Trimiew of what he's had to go through. And Mr. Kozak said, people don't want to accept responsibility.

Mr. Forsythe sat up there for the railroad, and he did everything but accept responsibility for what happened to his mate, Mr. Trimiew.

Now, justice, under the Court's instructions, is not half justice. It's not half of what would make Mr. Trimiew whole. That's not being fair, under the Law. What's being fair is what the Law says you should do, when awarding damages.

And as Mr. Hajek pointed out, if the railroad's negligence was the cause, even the slightest, then the verdict is for Mr. Trimiew. And what you really need to discuss back there is how much the award is.

Tr.213

You're not going to have any problem arriving at that decision. so, really, the damages and what to award is what you really need to think about.

And the point of his wages that he would have earned, that's the staring point. That's just what he would have earned; the hundred and thirty-four thousand dollars.

I should mention, he earned two hundred and eighty-five dollars in the custodial job that he tried. And God didn't he try. This man wants to be working. And that's something that, you know, you have to think about when you think about damages. What is it worth when you've lost your vocation?

And a man that works over twenty years at a job, has a lot of pride in that. And he can't do it. And on here when you consider the damages, you think about that, when you think about what is it worth if you can't do what you've done your whole life, and somebody else caused it.

Tr.214

I don't think Mr. Hajek -- I don't feel at all embarrassed about telling you that we asked for eight hundred thousand dollars in this case. I don't feel the least bit hesitant in saying that two or three times.

Because, what he went through, no one should go through from someone else's negligence. The catheter in the hospital. The loss of bowel movement. The walker. The picker upper. Not being able to tie his own shoes.

Now, if it had been from nothing and just life, that's fine. But, where someone else does it, our system of justice says:

If they're negligent, they are responsible. And to do full justice, is to award full damages. He's got a forty-six impairment of his back. And Mr. Trimiew has a life

expectancy, which is in the instructions of the Court, till age 80.

Now, that's under the Virginia Code that says the average he's supposed

Tr.215

to live to is to age 80. You can believe that he might live longer than that. But, the law says that's what you're to consider. And he's 67 now. And he's got those years to go with his back, just like it is, for the rest of his life.

Now, please remember this. This is Mr. Trimiew's one day in court. And you have the power to give him full justice. And I want you to consider this one last thought, when you're back there deliberating, before you come to your verdict. Think to yourselves, if you run into Mr. Trimiew on the street in a year, or a couple of years, and you pass him and you look him in the eye, will you think that you did full justice for Mr. Trimiew, if you see him on the street? And if you have done full justice, you know that when you see him on the street, you'll be able to say that to yourselves.

Let me thank you.

THE COURT: All right. Members of the jury, at this time, I'm going to

* * *

Tr. 221

NOTE: At this time, a brief recess is had; whereupon, the proceeding continues out of the presence of the jury, as follows:

THE COURT: You can bring the jury in, please.

NOTE: At this time, the jury returns to the courtroom; whereupon, the proceeding continues, as follows:

THE COURT: All right. Members of the jury, have you reached a verdict?

MS. NITZ: Yes.

THE COURT: Would you hand it to the Bailiff, please.

All right. The verdict of the jury is as follows:

"We the jury on the issues joined, find in favor of the plaintiff and assess his damages at five hundred thousand dollars. Signed Carol Nitz, foreman."

Is there a motion to pole the

Tr.222

jury?

MR. KOZAK: Yes, Your Honor, we'd like to do that.

THE COURT: Ladies and gentlemen, I am going to call your name. As I call your name, if the verdict that I just read, which is a verdict in favor of Mr. Trimiew in the amount of five hundred thousand dollars, if that is the amount of the verdict that you agreed to, individually, please say yes. If you did not individually agree to that verdict, please say no. Evelyn Brinson?

MS. BRINSON: Yes.

THE COURT: Mary Gregory?

MS. GREGORY: Yes.

THE COURT: Carl Nitz?

MS. NITZ: Yes.

THE COURT: Wayne Smith?

MR. SMITH: Yes.

THE COURT: Alfred Thompson?

MR. THOMPSON: Yes.

THE COURT: Raymond Woodbury?
MR. WOODBURY: Yes.

Tr.223

THE COURT: And Latanya Yeldell?
MS. YELDELL: Yes.
THE COURT: The Court finds that the verdict as read is, in fact, the verdict of this jury.

Ladies and gentlemen of the jury, let me thank you very much for your attendance here. I'm sure the last thing you want right now is another speech like the lawyers.

I'm not going to make one to you, but I want you to know how much I do appreciate your service. Usually our jurors are here for one day, you all were here for two days. So, you've done twice the amount of what we ask our jurors to do. Thank you very much. The only other thing I have to remind you of, though, is to remind you to call in next Wednesday to see if you have to be here next Thursday.

Have a very pleasant week.
NOTE: At this time, the jury

Tr.224

is excused; whereupon, the proceeding continues, as follows:
THE COURT: Anything else, counselor?
MR. KOZAK: Your Honor, for the record I'd just make a motion to set aside the verdict.
THE COURT: Any comment on that?
MR. KOZAK: Well, basically the Law on the evidence, Your Honor.

I think that I attempted to make a motion to strike. But, I think that the evidence that was presented by the plaintiff didn't prove any negligence on the part of the -- on the part of the railroad.

The only basis for the railroad's negligence, in this case, was, obviously, the ballast that was along side the track. But, the evidence that was presented was that that was consistent with the procedures of the railroad, in that the regulation of the ballast always occurred as part of the T and S gang

Tr.225

operation, at the end of it.

And at the end of the evidence, there wasn't any evidence that this was an unusually dangerous situation. And that everybody who worked on the railroad, including Mr. Trimiew, knew and was aware of it and was trained to deal with it.

And for that reason, we feel that the jury's verdict is incorrect, as a matter of law.

THE COURT: All right. Thank you very much, Mr. Kozak.

The Court feels this was a jury question; both with regard to liability and with regard to damages. So, I feel that there was sufficient evidence to support the jury's verdict.

The motion to set aside, or to -- yeah, set aside the jury verdict will be overruled. Judgment will be entered in favor of the plaintiff for five hundred thousand dollars.

Counsel, thank you very much.

THE BAILIFF: Court stands adjourned.

Tr.226

NOTE: At this time, the proceeding is concluded.

INSTRUCTION NO. 1

Your verdict must be based on the facts as you find them and on the law contained in all of these instructions.

The issues in this case are:

(1) Was the defendant negligent?

(2) If he was negligent, was his negligence a cause of the accident?

On these issues the plaintiff has the burden of proof.

(3) Was the plaintiff negligent?

(4) If he was negligent, was his negligence a cause of the accident?

On these issues the defendant has the burden of proof.

(5) If the plaintiff is entitled to recover, what is the amount of his damages?

On this issue the plaintiff has the burden of proof.

Your decision on these issues must be governed by the instructions that follow.

INSTRUCTION NO. 2

The Court instructs the Jury that when a party has the burden of proof on an issue, then he must prove that issue by the greater weight of all the evidence. This is sometimes called the preponderance of the evidence. It is that evidence which you find more convincing. The testimony of one witness whom you believe can be the greater weight of the evidence.

INSTRUCTION NO. 3

The Court instructs the Jury that you are the judges of the facts, the credibility of the witnesses, and the weight of the evidence. You may consider the appearance and manner of the witnesses on the strand, their intelligence, their opportunity for knowing the truth and for having observed the things about which they testified, their interest in the outcome of the case, their bias, and, if any have been shown, their prior inconsistent statements, or whether they have knowingly testified untruthfully as to any material fact in the case.

You may not arbitrarily disregard believable testimony of a witness. However, after you have considered all the evidence in the case, then you may accept or discard all or part of the testimony of a witness as you think proper.

You are entitled to use your common sense in judging any testimony. From these things and all the other circumstances of the case, you may determine which witnesses are more believable and weigh their testimony accordingly.

DEFENDANT'S INSTRUCTION NO. 4

You must consider and determine this case as litigation between persons of equal standing in the community. You should not be influenced or affected by the fact that the Norfolk and Southern Railway Company is a railroad or a corporation, nor should you be in any way influenced by any thoughts or ideas you may have as to the financial standing of any party to this litigation. Such matters have no proper place in a case of this kind. This case is to be considered an determined by you in the same unbiased way as you would consider and determine a case between two private individuals.

DEFENDANT'S INSTRUCTION NO. 5

A witness who has special training, education or experience in a particular science, profession or calling, may be allowed to express an opinion in addition to giving testimony as to facts. You are not bound, however, by such an opinion. In determining the credibility and the weight to be given to such opinion evidence, you may consider, among other things, the education, training, experience, knowledge and ability of that witness, the reasons given for his opinion, the sources of his information, together with the factors already given you for evaluation the testimony of any other witness.

INSTRUCTION NO. 6

The Court instructs the jury that negligence is the failure to use ordinary care. Ordinary care is the care of a reasonable person would have used under the circumstances of this case.

INSTRUCTION NO. 7

Since a corporation can cat only through its officers, or employees, or other agents, the burden is on the plaintiff to establish, by a preponderance of the evidence of the case, that the negligence of one or more officers, or employees, or other agents of the railroad [other than the plaintiff himself] was a cause of any injuries and consequent damages sustained by the plaintiff.

Any negligent act or omission of an officer, or employee, or other agent of a corporation, in the performance of his duties, is held in law to be the negligence of the corporation.

DEFENDANT'S INSTRUCTION NO. 8

The mere happening of an accident causing injuries to Clinton Trimiew does not make Norfolk and Southern Railway Company liable nor does it raise any presumption of negligence on the part of Norfolk and Southern Railway Company.

INSTRUCTION NO. 9

Plaintiff alleges that the railroad's conduct was negligent in that it did not provide plaintiff with a safe place to work.

Section 1 of the Federal Employers' Liability Act (45 U.S.C.A. Section 51), one of the Acts under which plaintiff claims the right to recover damages in this action, provides in part that:

> "Every common carrier by railroad while engaging in commerce between any of the several States. . .shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury. . . of any of the officers, agents, or employees of such carrier. . . ."

It is agreed that, at the time and place alleged by plaintiff, the defendant, Norfolk and Southern, was a common carrier by railroad, engaged in interstate commerce; that the plaintiff was then an employee of the railroad engaged in such commerce.

INSTRUCTION NO. 10

The Court instructs the jury that the duty of the railroad to use ordinary care to provide its employees with a reasonably safe place to work includes the inspection of the workplace for hazards and the taking of precautions to protect employees from possible unsafe conditions, practices and/or defects.

If a railroad fails to perform this duty, then it is negligent.

INSTRUCTION NO. 10A

The Court instructs the jury that the duty to furnish an employee with a safe working place is a continuing one, and notice of defects and dangers will be imputed to the railroad where they could have been discovered by reasonable inspection and by the exercise of reasonable care.

DEFENDANT'S INSTRUCTION NO. 11

The Norfolk and Southern Railway Company was not required under the law to furnish Clinton Trimiew a place to work which was absolutely safe. Its duty in that respect was only to exercise reasonable and ordinary care to provide a reasonably safe place for him to perform the work he was performing at the time of the incident in question.

INSTRUCTION NO. 12

The Court instructs the jury that the notice and knowledge to the railroad of an unsafe condition may be actual notice or constructive notice. Constructive notice is that knowledge of a condition the railroad should have discovered by exercising ordinary care.

DEFENDANT'S INSTRUCTION NO. 13

You are instructed that guidelines or procedures enacted by the railroad do not establish the standard of care for the railroad, but you may consider them in determining whether the railroad acted reasonably.

INSTRUCTION NO. 14

The Court instructs the jury that general, cautionary rules enacted by the railroad do not set the standard of care for the plaintiff at the time and place in question, but you may consider them in determining whether the plaintiff acted reasonably.

DEFENDANT'S INSTRUCTION NO. 15

It was the continuing duty of the Clinton Trimiew to exercise reasonable and ordinary care for his own safety and protection. If we did not, then he was negligent.

In your consideration of this issue, you may consider Clinton Trimiew's actions in the light of any conditions known to him.

DEFENDANT'S INSTRUCTION NO. 16

If you find that plaintiff violated a safety rule of the defendant and that this violation contributed in whole or in part to the accident, you may consider this violation as evidence of negligence on the part of the plaintiff.

INSTRUCTION NO. 17

You shall find your verdict for the plaintiff, if he proved by the greater weight of the evidence:

1) that the defendant was negligent, and

2) that the defendant's negligence was a cause, in the slightest, of the plaintiff's injuries.

If the plaintiff failed to provide either or both of the two elements above, then you shall find for the defendant.

If you find your verdict for the plaintiff, and if the defendant proves by the greater weight of the evidence that the plaintiff was contributorily negligent, then you shall reduce the amount of the verdict in proportion to the relative negligence of the plaintiff and the defendant.

INSTRUCTION NO. 18

In determining the damages to which the plaintiff is entitled, you may consider any of the following which you believe by the greater weight of the evidence was caused by the defendant:

(1) any bodily injuries he sustained and their efforts on his health according to their degree and probable duration;

(2) any physical pain and mental anguish he suffered in the past and any that he may be reasonably expected to suffer in the future;

(3) any associated humiliation or embarrassment;

(4) any inconvenience caused in the past and any that probably will be caused in the future;

(5) any medical expenses in the past;

(6) any earnings he lost because he was unable to work at his calling; and,

(7) any loss of earnings, fringe benefits and lessening of earning capacity that he may reasonably be expected to sustain in the future;

Your verdict should be for such sum as will fully and fairly compensate the plaintiff for the damages he sustained as a result of the accident.

INSTRUCTION NO. 19

If you find that the plaintiff had a condition before the accident that was aggravated as a result of the accident, then if you find your verdict for the plaintiff, he may recover for the aggravation but he is not entitled to recover for the pre-existing condition.

DEFENDANT'S INSTRUCTION NO. 20

If you find in favor of the plaintiff and decide to make an award for any loss of earnings in the future, you must take into account the fact that the money awarded by you is being received all at once time instead of over a period of time extending into the future and that plaintiff will have the use of the this money in a lump sum. You must, therefore, determine the present value or present worth of the money which you award for such future loss.

DEFENDANT'S INSTRUCTION NO. 21

If you find that the Norfolk and Southern Railway Company was negligent and that such negligence contributed in whole or in part to plaintiff's injury, but that plaintiff was himself negligent and that such negligence contributed in part to his injury, then plaintiff's damages must be reduced in proportion to the amount of his contributory negligence.

Accordingly, if you find the plaintiff's injury resulted in whole or in part from the negligence of both the plaintiff and the railroad, then you shall determine the damages to be awarded in the following manner:

First: Determine the amount of plaintiff's damages in dollars without considering the effect of the negligence of the plaintiff.

Second: Determine what percentage the plaintiff's negligence was of the total combined negligence.

Third: Reduce the amount of the plaintiff's damages, as previously determined, by the percentage of the plaintiff's negligence.

DEFENDANT'S INSTRUCTION NO. 22

You have been instructed as to how plaintiff's contributory negligence may limit the right to recover damages. However, it should be noted that in certain circumstances, the plaintiffs own negligence may be a complete bar to recovery. For, example, if you find that the plaintiff was guilty of negligence, and that plaintiff's negligence was the sole cause of his injury, then you must return your verdict in favor of the defendant.

DEFENDANT'S INSTRUCTION NO. 23

If your verdict is in favor of Clinton Trimiew you will not increase the amount of your verdict by reason of federal, state or local income taxes, since the amount awarded to Clinton Trimiew is not taxable income to him within the meaning of these tax laws.

DEFENDANT'S INSTRUCTION NO. 24

The Virginia Life Expectancy Table shows that a 67 year old male such as the plaintiff has a remaining life expectancy of 12.9 years. You may use this information in determining life expectancy, but it is not in any way conclusive or binding. You should consider it along with all of the other evidence relating to the health, construction and habits of the plaintiff.

DEFENDANT'S INSTRUCTION NO. 25

The fact that I am instructing you as to the rules of the law which are to govern you in your consideration of the question of damages is not to be understood as an opinion by me as to whether damages should or should not be allowed. This is a matter solely for your determination under the rules of the law as I have given them to you.

INSTRUCTION NO. 26

Any statements of counsel referring to the amount sued for, and any suggestion by counsel of an appropriate sum of money to be awarded as a verdict, are not evidence in this case. They are only statements and suggestions of counsel, and are in no way binding upon you.

INSTRUCTION P-D

If you find that the railroad and the employee were both negligent, and that the negligence of each combined to cause the employee's injuries, then the employee is entitled to recover, but you are required to diminish his damages in proportion to the amount of negligence attributable to him.

TRIMIEW'S EXHIBIT 18

NORFOLK SOUTHERN CORPORATION
NUMBER MW&S 020 STANDARD PROCEDURE

TITLE:

BALLAST: USE, UNLOADING, AND REPORTING

* * * *

SCOPE AND NATURE

To establish a uniform system for the use, unloading, and reporting use of ballast.

* * * *

2. UNLOADING 2

* * * *

.02 Ballast Sections.

a. Standard ballast section from end of tie to edge of slope is be follows:

	Jointed Rail	Welded Rail
Inside of Curve	0"	6"
Outside of Curve	6"	12"
Tangent	0"	6"

* * * *

UNLOADING.

* * * *

.04 Ballast will not be unloaded more than 3" above top of rail for a distance of 14" from field side of rail and then the maximum height above top of rail will be 8" beyond 14" from rail. This must be checked after ballast is unloaded.

* * * *

.06 Unloaded ballast must be cleared from road crossings and any parts of switches which interfere with proper operation of the switch.

TRIMIEW'S EXHIBIT 16

NORFOLK SOUTHERN RAILWAY.
NUMBER MW&S 390
STANDARD PROCEDURE

TITLE:
MAINTAINING TRACK STABILITY

* * * *

SCOPE AND NATURE

To establish a uniform system for prevention of buckled track due to extreme changes in rail temperature.

* * * *

2. TRACK CONDITIONS 2
.01 Ballast Sections 2

* * * *

Ballast Sections

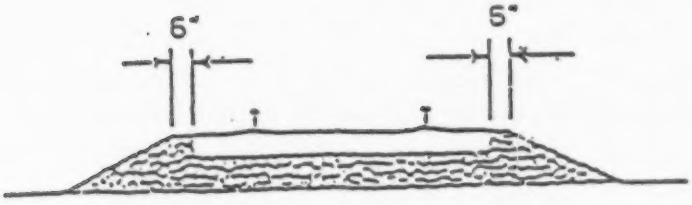
A full standard ballast section must be maintained for jointed and welded rail track sections.

Standard ballast sections are as shown in the sketches below and in the next column.

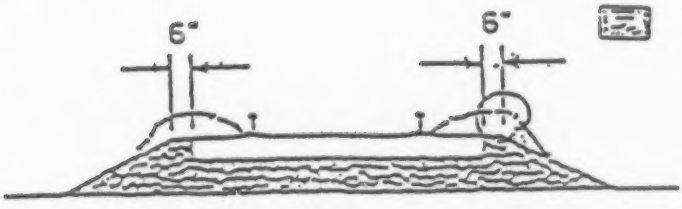
* * * *

TRIMIEW'S EXHIBIT 16 (Continued)

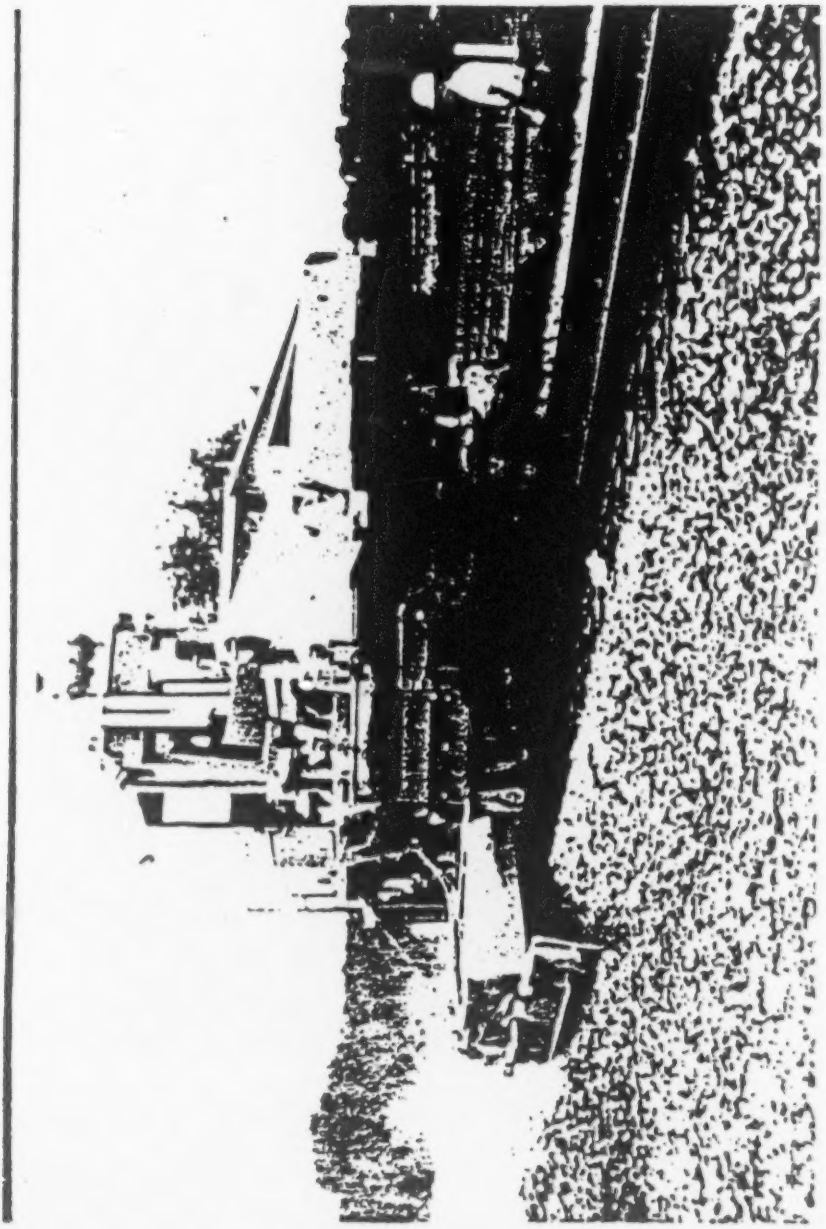
[DRAWING - NS STANDARD
PROCEDURE 390]



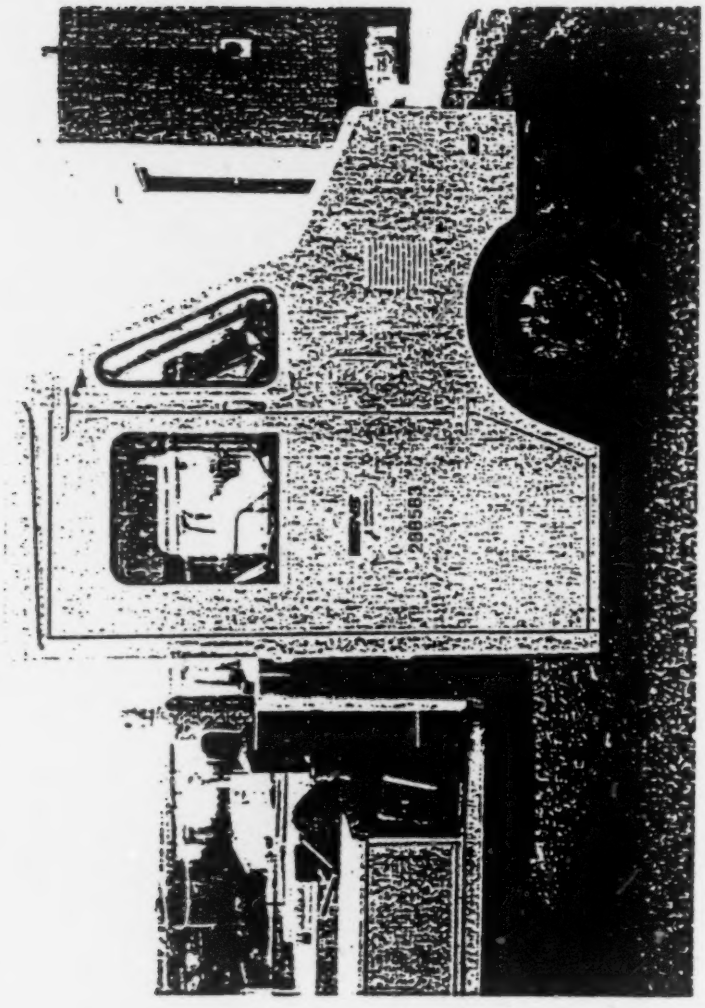
TRIMIEW'S EXHIBIT 10



TRIMIEW'S EXHIBIT 4



TRIMIEW'S EXHIBIT 2



TRIMIEW'S EXHIBIT 7



Assignments of Error

1. The lower Court erred in denying Norfolk Southern's motion to set aside the verdict on the grounds that there was no showing the railroad was guilty of primary negligence.

2. The lower Court erred in denying Norfolk Southern's motion to vacate the judgment on the grounds that it was excessive.

3. The lower Court erred by failing to order a new trial on all issues, a new trial on the issue of damages, or to put appellee on terms to accept a remittitur.

Supreme Court, U.S.
FILED
MAY 12 1997
OFFICE OF THE CLERK

No. 96-1608

In The

Supreme Court of the United States

October Term, 1996

CLINTON TRIMIEW,

Petitioner,

vs.

NORFOLK SOUTHERN RAILWAY COMPANY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Virginia

RESPONDENT'S BRIEF IN OPPOSITION

JOHN S. BARR
Counsel of Record
FRANK C. MALONEY, III
FRED R. KOZAK
MALONEY, BARR
& HUENNEKENS
A Professional Corporation
Attorneys for Respondent
NationsBank Center
1111 East Main Street
Suite 800
Richmond, Virginia 23219
(804) 644-0313

71151 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

QUESTION PRESENTED

Whether the Supreme Court of Virginia correctly ruled that, under applicable principles of FELA actions, petitioner failed as a matter of law to present sufficient evidence to raise a jury issue on the question of respondent's negligence?

RULE 29.6 LISTING

Respondent's parent corporation is Norfolk Southern Corporation. Respondent's subsidiaries are: Airforce Pipeline, Inc.; Alabama Great Southern Railroad Company, The; Algers, Winslow and Western Railway Company; Atlantic and East Carolina Railway Company; Augusta and Summerville Railroad Company; Beaver Street Tower Company; Camp Lejeune Railroad Company; Central of Georgia Railroad Company; Central Transfer Railway and Storage Company; Chatham Terminal Company; Chesapeake Western Railway; Cincinnati, New Orleans and Texas Pacific Railway Company, The; Citico Realty Company; Georgia Southern and Florida Railway Company; High Point, Randleman, Asheboro and Southern Railroad Company; Interstate Railroad Company; Lamberts Point Barge Co., Inc.; Memphis and Charleston Railway Company; Mobile and Birmingham Railroad Company; Norfolk and Portsmouth Belt Line Railroad Company; Norfolk and Western Railway Company; North Carolina Midland Railroad Company, The; North Carolina Railroad Company; North Charleston Terminal Company; Rail Investment Company; Shenandoah-Virginia Corporation; Railbox Company; Railgon Company; South Western Rail Road Company, The; Southern Rail Terminals, Inc.; Southern Rail Terminals of North Carolina, Inc.; Southern Region Coal Transport, Inc.; Southern Region Materials Supply, Inc.; Southern Region Motor Transport, Inc.; State University Railroad Company; Tennessee, Alabama & Georgia Railway Company; Tennessee Railway Company; Terminal Railroad Association of St. Louis; TTX Company; Virginia and Southwestern Railway Company; Woodstock & Blocton Railway Company; Yadkin Railroad Company.

TABLE OF CONTENTS

	Page
Question Presented	i
Rule 29.6 Listing	ii
Table of Contents	iii
Table of Citations	iv
Statement of the Case	1
A. Course of Proceedings and Disposition of the Case Below.	1
B. Statement of Facts and Correction of Misstatements in Petition.	2
Reasons for Denying the Writ	7
I. The Decision Below Does Not Conflict With Prior Decisions Of This Court Or With The Well-Settled Principles Of FELA Actions.	7
II. The Virginia Supreme Court Correctly Decided That Petitioner's Evidence Failed As A Matter Of Law to Raise A Jury Issue On The Question Of Respondent's Negligence.	13
Conclusion	17

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Atlantic Coast Line R. Co. v. Tiller, 142 F.2d 718 (4th Cir. 1944) 10

Atlantic Coast Line R.R. Co. v. Gunter, 229 F.2d 842 (5th Cir. 1956) 15, 16

Baez v. Southern Pacific Co., 26 Cal. Rptr. 899 (Cal. App. 1963) 11

Brady v. Southern Ry. Co., 320 U.S. 476 (1943) 7

Gabbard v. Knight, 202 Va. 40, 116 S.E. 2d 73 (1960) 2

Hahn v. Norfolk and Western Ry. Co., 375 N.E. 2d 914 (Ill. App. 1978) 15, 16

Harp v. Illinois Central Gulf R.R. Co., 370 N.E. 2d 826 (Ill. App. 1977) 15, 16

Norfolk and Western Ry. Co. v. Hughes, 247 Va. 113, 439 S.E. 2d 411, *cert. denied*, __ U.S. __, 114 S. Ct. 2136 (1994) 12

Stover v. Norfolk and Western Ry. Co., 249 Va. 192, 455 S.E. 2d 238, *cert. denied*, __ U.S. __, 116 S. Ct. 186 (1995) 12

Contents

Page

Taylor v. Missouri Pacific R.R. Co., 510 S.W. 2d 735 (Mo. App. 1974) 14

Tiller v. Atlantic Coast Line R. Co., 323 U.S. 574 (1945) 8, 10, 11

Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54 (1943) 8, 9, 11, 15

Statute Cited:

45 U.S.C. § 51, *et seq.* 1, 8

Respondent Norfolk Southern Railway Company (NS) respectfully requests this Court to deny the petition for writ of certiorari seeking review of an opinion of the Supreme Court of Virginia. The Virginia Supreme Court's opinion is reported at 253 Va. 22, 480 S.E. 2d 104 (Va. 1997). For the convenience of the Court, all citations to the opinion below will be to the opinion included at pages 1-9 of the Appendix to the petition.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of the Case Below.

Petitioner filed this action against NS under the Federal Employer's Liability Act (FELA), 45 U.S.C. § 51, *et seq.*, seeking damages for personal injuries. Petitioner alleged that he hurt his back on August 20, 1993, when he stepped out of a high rail inspection vehicle and slipped on ungroomed ballast rock lining an area of railroad track.

The motion for judgment was filed on February 28, 1995, and served on March 2, 1995. The case was tried on December 7 and 8, 1995 before a jury in the Circuit Court for the City of Richmond, Virginia. The jury returned a verdict for petitioner in the amount of $500,000. NS moved to set aside the verdict on the grounds that there was no evidence that it was negligent, and that the injury was caused solely by petitioner's own negligence. The trial court denied this motion, and on December 11, 1995 entered an order granting judgment to petitioner in accordance with the jury's verdict.

On December 13, 1995, NS filed a motion for the trial court to reconsider its earlier motion to set aside the verdict.[1] NS also

1. Petitioner notes that NS did not move to challenge the evidence of negligence until after the verdict. Under Virginia law, a defendant has the (Cont'd)

moved the trial court to vacate the jury's verdict, or grant a remittitur. After a hearing on December 19, 1995, the trial court denied these motions.

NS appealed the trial court's rulings to the Supreme Court of Virginia. The Virginia Supreme Court granted an appeal, but only as to whether the evidence was sufficient to present a jury issue on the question of NS's negligence. On January 10, 1997, the Virginia Supreme Court issued its opinion ruling that petitioner's evidence was insufficient as a matter of law to raise a jury issue that NS was negligent. Accordingly, the Virginia Supreme Court reversed and entered final judgment for NS.

B. Statement of Facts and Correction of Misstatements in Petition.

Petitioner worked for NS as a track laborer for over twenty years. At the time of this incident, petitioner was assigned to accompany assistant track supervisor Robert Forsythe on his regular trips inspecting approximately sixty miles of track from Burkeville to Richmond, Virginia. These inspections were made in a "high rail" vehicle, a regular truck with retractable runners that allows the vehicle to ride on the railroad tracks.

On August 20, 1993, petitioner and Forsythe were in a high rail vehicle inspecting an area of open track outside Burkeville. Forsythe stopped the vehicle to clear a small tree from near the tracks. While dismounting the vehicle from the passenger side, petitioner slipped and fell on ballast rock lying along the tracks.

(Cont'd)
option of testing the sufficiency of the evidence by a motion to strike the plaintiff's evidence, or by moving to set aside the jury's verdict. *See Gabbard v. Knight*, 202 Va. 40, 43, 116 S.E. 2d 73, 75 (1960). NS's strategy in exercising this option should not be misconstrued as a favorable comment on the strength of petitioner's evidence of negligence.

Ballast rock is stone that is put down to stabilize and hold the track in place. It is also sloped to provide drainage. [App. at 31, 39]. Periodically, the railroad must replace old cross ties and resurface track sections in what is called a timbering and surfacing (T&S) operation. A T&S operation is a large undertaking involving numerous pieces of equipment. It must be scheduled and planned for months in advance. Before a scheduled T&S operation, ballast rock that will be used in the operation is unloaded along the sides of the track. The ballast is unloaded through doors on both sides of a multi-car train as it moves slowly down the track. When properly unloaded along areas of open track, the ballast is laid out in a berm eight to twelve inches above the level of the track. [App. at 126].

The ballast rock remains built-up alongside the track until the T&S operation comes through, which may be a period of months after the ballast is unloaded. After the old cross ties are replaced in the T&S operation, a machine called a ballast regulator comes down the track and smooths or "grooms" the ballast to the prescribed profile. [App. at 126-127]. The proper profile after the ballast is regulated is called a full standard ballast section. The ballast in a standard section extends six inches out from the edge of the cross tie, and then slopes down to the ground. The ballast is generally groomed level with the cross ties. [App. at 113-114]. NS has standard procedures on track stability and ballast that apply to these operations. [App. at 124-125].

In this case, ballast was unloaded along an approximately six mile stretch of track beginning in Burkeville and running north toward Richmond. The ballast was unloaded in March 1993, in advance of a T&S operation later that summer. [App. at 127]. In open track areas, the ballast was laid out in a berm about eight to ten inches above the rail. [App. at 134]. When they reached road crossings and switches, the workers tried to

close the doors on the train so that ballast was not dumped in those areas. [App. at 37]. A switch is an area where the track goes from one type to another; on this particular area of track from main line to various types of siding. [App. at 133]. Forsythe and petitioner were required to make walking inspections at all switches monthly, and weekly inspections of the switch compromise bars — a joint bar where the track goes from one size to another. [App. at 132-133]. Trainmen also were required to dismount in those areas to throw the switch. Accordingly, the amount of ballast in switch areas was slight. [App. at 133].

In April or May, 1993, track supervisor Steve Palmer learned that the T&S operation would not be coming through that summer as planned. [App. at 116]. As a result, the ballast remained built up along the tracks at the time petitioner slipped in August.

Petitioner presented evidence that during the summer of 1993, a ballast regulator was located on a side track at nearby Crewe, Virginia. A number of laborers qualified to operate the regulator testified that it would have taken approximately one day to groom the section of unloaded ballast. [App. at 32-33, 83].

Palmer testified that a ballast regulator was not available in the district during that period of time, and that he would have had to schedule a ballast regulator through his supervisor. [App. at 116-117]. Forsythe testified that a ballast regulator may have been in the district or an adjacent district during some of the time, but it may have had mechanical problems, and if used, would have been used on small jobs in more highly trafficked areas. [App. at 138-139].

Forsythe further testified that the ballast along the tracks at the time of petitioner's fall was not improper in relation to the

railroad's standard policies and procedures governing ballast and track stability. Forsythe said that a period of several months, in this case five months, was well within the normal time frame that ballast would be unloaded in anticipation of a T&S operation. [App. at 127-128].

Petitioner wrongly states that unloaded ballast was normally regulated within a month. [Petition at 6]. Petitioner himself testified that most of the time it was usually a month or two before the T&S operation came through and regulated the ballast. [App. at 95]. An employee witness called by petitioner testified that the ballast could be on the ground about two or three months before the T&S operation. [App. at 51]. Petitioner's evidence further established that during the time before the T&S operation came through, the unloaded ballast remained built up along the track. [App. at 40, 102-103].

Petitioner, together with Forsythe and other employees, participated in the ballast unloading in March 1993. It was common for track laborers to help unload ballast; petitioner said he had probably done it more than six or seven times before. [App. at 102]. In his twenty years working on the railroad, petitioner had walked on ungroomed ballast after it was unloaded, and he knew that it was more difficult to walk on than regulated ballast. [App. at 101]. Palmer observed that all ballast is difficult to walk on. [App. at 115].

Palmer testified that several months before the incident, he used a large gang truck to demonstrate to the employees the proper way to mount and dismount equipment. He demonstrated how to dismount facing the equipment, and maintaining three points of contact (two hand holds and a foot hold) until one foot was securely on the ground. Palmer said he told the men that this was the proper method to mount and dismount all equipment. [App. at 119-120]. Petitioner admitted he was present at the

demonstration, but said that he did not hear any reference to "three points of contact." Petitioner also said he did not hear Palmer say this procedure was to be used on all equipment. [App. at 104-105].

Petitioner's evidence was that Palmer never demonstrated dismounting from a high rail vehicle in particular, and that Palmer did not use the phrase "three points of contact" until after petitioner's accident. One employee, however, testified that when he got out of a high rail vehicle, he would get out backwards, facing the truck. [App. at 54]. He said NS had not instructed him to do that — common sense simply told him that was the safest way. [App. at 54].

Between March and August 1993, petitioner frequently rode through the area where the ballast was unloaded as part of his job assisting Forsythe with track inspection. Normally, track inspections were scheduled twice a week. During the summer, inspections were made daily to monitor the effects of heat on the rails. [App. at 132].

On the day he fell, petitioner and Forsythe stopped at a few switches in the Burkeville area. Petitioner testified there were no mounds of ballast around the switches. [App. at 86]. When they reached the spot where Forsythe stopped to clear the small tree from the tracks, petitioner looked down at the ground before dismounting the high rail vehicle and saw the ballast along the track. He said it looked safe to get out. [App. at 88]. Petitioner then stepped out of the vehicle facing forward with only one hand on the vehicle at the time his foot slipped on the ballast. [App. at 103-104].

Petitioner testified that he knew the ungroomed ballast was in the area that he fell, but that he had never stopped before at that particular spot. He had only stopped at switches. [App. at

96]. Indeed, petitioner slipped in an area of open track that was not a place where workers would often walk. [App. at 139].

In his petition, petitioner repeatedly states that the unloaded ballast was frozen and came out in chunks; and that there were large, uneven piles of ungroomed ballast along the track. Petitioner never testified at trial, however, about any unusual piles or chunks of ballast in the area where he fell. Moreover, petitioner took a picture of "pretty much the exact area" where he fell. [App. at 91]. No unusually high piles or mounds of ballast are visible. The picture shows a continuous, even berm of ballast at the proper height for ungroomed ballast.

REASONS FOR DENYING THE WRIT

I.

THE DECISION BELOW DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT OR WITH THE WELL-SETTLED PRINCIPLES OF FELA ACTIONS.

This case presents no important question for the Court to decide. The proceeding below is merely an example of the Virginia Supreme Court exercising its right under the FELA to determine, as a matter of law, whether the petitioner's evidence of negligence on the part of NS was sufficient to justify submitting the case to a jury. *See Brady v. Southern Ry. Co.*, 320 U.S. 476, 479-480 (1943). This is a factual determination that varies from case to case and "is of no doctrinal importance." *Id.* at 480.

After reviewing the facts and the law under the FELA, the Virginia Supreme Court held that the petitioner's evidence was insufficient as a matter of law to raise a jury issue on the question of NS's negligence. Petitioner argues that this holding is a ruse.

According to petitioner, the Virginia Supreme Court really based its decision on the ground that petitioner assumed the risk of his injury. Knowing assumption of risk is an impermissible defense under the FELA, petitioner argues, the Virginia Supreme Court concealed its true grounds for decision behind a finding that NS was not negligent in the first place. To make this argument, the petitioner distorts the opinion below and previous opinions of this Court.

Petitioner argues that in the cases of *Tiller v. Atlantic Coast Line R. Co.*, 318 U.S. 54 (1943) (*Tiller I*) and *Tiller v. Atlantic Coast Line R. Co.*, 323 U.S. 574 (1945) (*Tiller II*), this Court caught the Fourth Circuit Court of Appeals doing what petitioner accuses the Virginia Supreme Court of doing here, namely, using a finding of "no negligence" as a synonym for assumption of risk. Neither the Fourth Circuit nor the Virginia Supreme Court employed the subterfuge petitioner charges.

This Court granted certiorari in *Tiller I* because of important questions involved in the Court of Appeals' interpretation of the scope and effect of the then recently enacted amendment to § 4 of the FELA (the "Amendment"). The Amendment provided that employees shall not be held to have assumed the risks of employment where injury or death resulted in whole or in part from the employers' negligence. In analyzing the Court of Appeals' decision, this Court found that the Circuit Court attempted to distinguish between two types of assumption of risk: (1) assumption of risk as a defense by employers who themselves had been negligent in the first instance; and (2) assumption of risk in the sense that the employer was not negligent at all for failing to protect employees from ordinary risks of the business, because the employee assumed those risks. *Tiller I* at 57. The Court of Appeals interpreted the Amendment as eliminating assumption of risk as a defense in cases where the employer had been negligent, but preserving the doctrine of assumption of risk to negate negligence on the part of the employer for injuries due to ordinary risks. *Id.*

This Court rejected a dichotomy that treated assumption of risk "sometimes as defense to negligence, and sometimes as the equivalent of non-negligence." *Id.* at 58. This Court held that the Amendment was intended to eliminate the doctrine of assumption of risk in FELA cases, and the Amendment "did not mean to leave the identical defense for the master by changing its name to 'non-negligence'." *Id.*

While making it clear that the Amendment abolished the doctrine of assumption of risk in FELA cases, this Court recognized that liability under the FELA still requires an initial finding of employer negligence that was the proximate cause of an employee's injury. *Tiller I* at 67. Justice Frankfurter thought that misinterpretation of the Amendment resulted from loose usage of the phrase "assumption of risk." As Justice Frankfurter explained in his concurring opinion, the proper interpretation of the FELA is that once negligence on the part of the defendant is established, the defendant cannot be relieved of liability by pleading that the employee "assumed the risk." *Tiller* at 71. On the other hand, the FELA leaves intact negligence as the foundation for the defendant's liability. *Id.*

Justice Frankfurter observed that the FELA did not create a system of worker's compensation, unconcerned with whether there was negligence on the part of the employer. Instead, Congress chose to liberalize the law of negligence by abolishing traditional common law defenses based on the conduct of the employee (such as assumption of risk), once the employer's negligence is established. *Id.*

On remand, the plaintiff in *Tiller I* amended her FELA complaint by adding an alternative theory of liability. Plaintiff's decedent was struck by rail cars being pushed backward by a locomotive. The new claim alleged that the locomotive did not have a rear light, in violation of the Federal Boiler Inspection

Act (FBIA). *See Atlantic Coast Line R. Co. v. Tiller*, 142 F.2d 718 (4th Cir. 1944). The jury returned a general verdict against the defendant that did not specify whether liability was found under the FELA or the FBIA. On appeal, the Circuit Court examined whether there was sufficient evidence to submit the FBIA claim to the jury. The Circuit Court held that even if failure to provide the rear light was a violation of the FBIA, the plaintiff failed to prove that this was the proximate cause of the accident. The Circuit Court reasoned that because the cars being pushed toward the decedent would have obscured any light on the rear of the locomotive, the light would not have been visible to the decedent in any case. *Id.* Accordingly, the Circuit Court reversed the jury verdict.

In *Tiller II*, this Court reversed the Court of Appeals on the ground that the jury could have found that a light on the rear of the locomotive may have given the decedent some warning, even if obscured by the cars. Accordingly, this Court held that both charges of negligence were jury issues.

This Court found an additional ground for reversal in *Tiller II*. The trial court instructed the jury that if they believed the back-up movement of the locomotive was unusual, unexpected and a departure from the usual practice, and that decedent had no reasonable cause to believe the movement would be made, then it became the duty of the railroad to give him an adequate warning of the movement. Despite finding that the back-up movement was unusual, however, the Circuit Court ruled the railroad had no duty to warn. The Circuit Court reached this conclusion because no railroad rule or custom prohibited the unusual movement, there was some evidence that the same movement had occurred on other occasions, and the decedent was familiar with the local situation.

This Court disagreed with the Circuit Court's conclusion,

but not because the Circuit Court improperly ruled on the basis of assumption of risk. Rather, this Court said that the jury could reasonably have found that the backing movement of the locomotive was such an unprecedented departure from the usual practice that the railroad may have been negligent for not providing adequate warning of the movement. *Tiller II* at 580. Accordingly, the duty to warn was also a jury question.

Importantly, the Court in *Tiller II* approved the trial court's instruction as a correct statement of the law. *Id.* Under that instruction, the duty to provide an adequate warning arose only after it was found that the back-up movement of the locomotive was unusual, and that the decedent had no reasonable cause to anticipate it. This statement of the law does not support petitioner's broad pronouncement that the *Tiller* cases impose a blanket duty on railroads to warn employees of "even customary dangers." [Petition at 10]. Petitioner apparently forgets that the FELA does not make the railroad the insurer of workers' safety, nor does it impose the duty to provide an absolutely safe workplace. The FELA does not impose on employers the burden of removing every potential risk from the workplace. Nor does the FELA impose a duty to warn employees of ordinary dangers of which they are already aware. *See Baez v. Southern Pacific Co.*, 26 Cal. Rptr. 899 (Cal. App. 1963) (railroad had no duty to warn or instruct an experienced carman of dangers in installing a dome car window that required no particular skill but only ordinary intelligence and physical strength).

In his attempt to capture this Court's attention, petitioner glosses over the principles stated in the *Tiller* cases. Certainly, the FELA eliminates as a defense for the negligent employer any conduct of the employee in assuming the risk of his injury. The decisions of this Court confirm, however, that employer liability is predicated on a showing of negligence, defined as the failure to exercise due care under the circumstances. In

determining whether sufficient evidence of negligence exists to present a jury question, a court must consider the totality of the circumstances, including the nature of the activity involved in the accident, any applicable rules or procedures, as well as the experience and knowledge of the employee. Consideration of these factors does not improperly inject assumption of risk issues into the court's decision. Instead, these factors bear on whether or not the employer exercised ordinary care in a particular case.

The Virginia Supreme Court fully recognized and properly stated the applicable principles of the FELA which govern this case. The opinion below states these principles, which were embodied in two recent cases in which the Virginia Supreme Court also properly found lack of negligence on the part of a railroad. *See Stover v. Norfolk and Western Ry. Co.*, 249 Va. 192, 455 S.E. 2d 238, *cert. denied*, __ U.S.__, 116 S. Ct. 186 (1995); *Norfolk and Western Ry. Co. v. Hughes*, 247 Va. 113, 439 S.E. 2d 411, *cert. denied*, __ U.S.__, 114 S. Ct. 2136 (1994). In this case, the Virginia Supreme Court recognized a railroad's duty to exercise reasonable care in furnishing its employees a safe place to work. The opinion below also recognized that railroads must conduct proper inspections to discover dangers in places where employees are required to work, and must take reasonable precautions for the employees' safety after determining the existence of such dangers. The opinion properly noted, however, that even under the FELA, a railroad must be guilty of some act of negligence, however slight, before an injured employee can recover. Furthermore, the Virginia Supreme Court correctly stated that reasonable foreseeability of harm is an essential element of FELA negligence.

II.

THE VIRGINIA SUPREME COURT CORRECTLY DECIDED THAT PETITIONER'S EVIDENCE FAILED AS A MATTER OF LAW TO RAISE A JURY ISSUE ON THE QUESTION OF RESPONDENT'S NEGLIGENCE.

The Virginia Supreme Court carefully analyzed the facts presented in this case in reaching its conclusion that petitioner failed to carry his burden of establishing negligence on the part of NS. Petitioner failed to present any evidence that the condition of the ballast rock at the time of his fall violated any rule or standard with regard to ungroomed ballast. The ballast on the day that petitioner fell was in the same condition as it was the day after it was unloaded from the train. According to petitioner's own evidence, it was not unusual for unloaded ballast to remain unregulated for up to three months before a T&S operation. Everyone agreed that ungroomed ballast was difficult to walk on. As the Virginia Supreme Court observed, however, petitioner presented no evidence that the ballast presented an unknown or unreasonable danger. [App. at 7-8].

Descriptions of the ballast as "excessively high" and "dangerous" are figments of petitioner's argument — there is no testimony or other evidence in the record that the ungroomed ballast where petitioner fell was unusual or dangerous. Petitioner tries to manufacture a dangerous condition by arguing that "frozen chunks" or lumps of stone created "huge piles" of ballast. But petitioner presented no evidence at trial that this condition existed where he fell. The opinion below noted that petitioner's photo of the "exact area" of the fall did not show ballast lying in "chunks and lumps", but only a smooth, constant mound of ballast piled along the rails. [App. at 7].

On page 11 of his petition, petitioner quotes "key language"

from the opinion below that purportedly reveals the presence of assumption of risk issues in the decision. In the quoted language, the Virginia Supreme Court observes that the ballast where petitioner fell was the proper height for ungroomed ballast, that workers like petitioner were "fully aware" of the condition of the ballast from long experience and from participating in the ballast unloading, and that the workers and petitioner knew the ungroomed ballast was difficult to walk on. But consideration of these facts does not demonstrate reliance on assumption of risk; rather, as the opinion states, these facts lead to the conclusion that "there was no basis for the defendant to foresee that the ballast, laid in routine fashion for miles along track in open country, posed an unreasonable danger to employees such as plaintiff." [App. at 8]. In other words, these facts go to the question of reasonable foreseeability of harm, a requirement of negligence under the FELA. Furthermore, reasonable foreseeability is determined by what should have been anticipated at the time; it is not determined by hindsight based on what has happened. *See Taylor v. Missouri Pacific R.R. Co.*, 510 S.W. 2d 735 (Mo. App. 1974).

The Virginia Supreme Court also properly considered NS's need to perform maintenance by unloading ballast along the track. As the Virginia Supreme Court noted, it would be an unreasonable burden to require NS to regulate unloaded ballast within a specified period of time. According to petitioner's theory, the unregulated ballast is a constant danger. Under that theory, petitioner must argue that if he had stepped out onto the ballast a month after it was unloaded, or perhaps even a day after it was unloaded, NS would have been liable. This untenable argument would require NS to regulate the ballast as soon as it is unloaded, even in remote areas of open track where a worker may seldom, if ever, go.

The duty imposed on the employer must be commensurate

with the risk. *See Tiller I*, at 67. Throughout his petition, petitioner refers to the ungroomed ballast as a "known danger", and even states that NS "never really contested" that petitioner had proven a dangerous condition as a result of the ballast. [*See* Petition at 14]. That is false. NS like everyone else acknowledged that ungroomed ballast is difficult to walk on. But NS consistently maintained that the ballast in this case did not pose an unreasonable danger to workers such as petitioner. The Virginia Supreme Court agreed. [App. at 8].

In this case, if the ballast had been regulated as petitioner contends it should have been, it is fair to say that NS would have had to repeat the unloading process when the T&S operation was rescheduled.[2] The Virginia Supreme Court found that was an unreasonable burden under these circumstances. Certainly, NS could not have reasonably foreseen the need to regulate the ballast in open track areas, given the nature of the potential risk involved.

The Virginia Supreme Court correctly noted that the other ballast cases cited by petitioner are factually different from this case. *See Atlantic Coast Line R.R. Co. v. Gunter*, 229 F.2d 842 (5th Cir. 1956); *Hahn v. Norfolk and Western Ry. Co.*, 375 N.E. 2d 914 (Ill. App. 1978); *Harp v. Illinois Central Gulf R.R. Co.*, 370 N.E. 2d 826 (Ill. App. 1977). The most notable difference

2. Petitioner suggests that redumping the ballast would not have been necessary, because the ballast regulator could be used to push the rock down or pull it up as needed. [Petition at fn. 2, p. 7]. The testimony cited by petitioner, however, was a description of the regulating process in which the witness said that the arms of the regulator could pull the rocks in or push them out to get a nice flow of ballast. [App. at 32]. This would be done, however, while the ballast was built up around the rail. There was no testimony that a regulator could be used as a substitute for the ballast unloading process. If that is the case, one wonders why the railroad would go through the laborious and presumably expensive exercise of dumping the ballast in the first place.

is *Gunter*, which occurred in a trafficked switch yard, as opposed to the open track where petitioner's mishap occurred. In *Harp*, plaintiff fell on ballast that was not properly tamped down after old ties were replaced. In *Hahn*, plaintiff slipped while closing a heavy door without assistance, an unusually difficult task that could not have been done differently, and had to be done on ballast that the plaintiff could not have known would roll under his feet while he was performing the task. None of these circumstances applies to petitioner.

Finally, petitioner argues that the Virginia Supreme Court erroneously declined to consider his argument that NS failed to instruct him or provide written rules on the safe way to dismount a high rail vehicle. As noted in the opinion below, the petitioner never plead this particular theory of negligence. [App. at 9]. Petitioner seeks to bootstrap this theory into the case through his general allegations of failure to warn and failure to provide a safe workplace. It really doesn't matter, however, whether failure to instruct made its way into the case, either through liberal interpretation of the pleadings or lack of objection at trial. Petitioner did not submit a jury instruction that would have led the jury to base its verdict on a failure to instruct theory. Petitioner's jury instruction on negligence was aimed at the theory that NS was negligent for failing to regulate the unloaded ballast. [App. at 161, Instruction No. 10]. Indeed, while petitioner relies heavily on a failure to warn theory in his petition, that theory also was not the subject of an instruction to the jury.

In summary, the Virginia Supreme Court's decision in this case is based on a proper interpretation of the common law and the principles of the FELA. The decision is not based on any hidden finding that petitioner assumed the risk of his injury. This is simply a case where the proof failed to raise a jury issue on negligence. Contrary to petitioner's assertions, this case involves no conflict with this Court's prior decisions and reaches no result inconsistent with proper federal law standards under the FELA.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN S. BARR
Counsel of Record
FRANK C. MALONEY, III
FRED R. KOZAK
MALONEY, BARR
& HUENNEKENS
A Professional Corporation
Attorneys for Respondent
NationsBank Center
1111 East Main Street
Suite 800
Richmond, Virginia 23219
(804) 644-0313

FILED
MAY 16 1997
OFFICE OF THE CLERK

No. 96-1608

In The

Supreme Court of the United States

October Term 1996

CLINTON TRIMIEW,

Petitioner,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SUPREME COURT OF VIRGINIA

Reply to Brief in Opposition

Eddie W. Wilson, Esquire*
Richard N. Shapiro, Esquire
Francis P. Hajek, Esquire
John M. Cooper, Esquire
Counsel of Record
WILSON, HAJEK & SHAPIRO, P.C.
1294 Diamond Springs Road
Post Office Box 5369
Virginia Beach, Virginia 23471
(757) 460-7776

Counsel for the Petitioner

THE LEX GROUP • 1205 East Main Street • Suite 2 East • Richmond, VA 23219
(804) 644-4419 • (800) 856-4419 • Fax: (804) 644-3256

3pp

PETITIONER'S REPLY BRIEF

The railroad seeks to convince this Court that it was free of negligence and the Virginia Supreme Court's ("VSC") reversal of the jury's verdict should stand. Despite these efforts, the plain words and holding of the VSC makes clear that it penalized Trimiew based on the abolished doctrine of assumption of risk, despite a Richmond jury's verdict (upheld by the Trial Court) supporting adequate negligence on the railroad.

The railroad most delicately addresses the VSC's state of denial as to whether ungroomed ballast rock was a known (and thus foreseeable) danger. (See Respondent's Brief at 15). "[D]ifficult to walk on" and "not [posing] an unreasonable danger" are the railroad descriptive phrases chosen. Id.

The VSC explicitly determined Trimiew assumed the risks of "known" workplace dangers in direct violation of 45 U.S.C. § 54. To allow this decision to stand is to ignore plain meaning of controlling federal law, and to shift significant liability from railroad employers back on to the workers. Such an assault on this Court's decision in Tiller I and Tiller II (citations in Trimiew's original Petition), should not be permitted despite the passage of a half century.

This Court should accept Trimiew's Petition, and summarily reverse the VSC and order reinstatement of the Circuit Court of Richmond's Judgment Order.

Respectfully submitted this 16th day of May, 1997.

CLINTON TRIMIEW

By: _____
Of Counsel

Eddie W. Wilson, Esquire*
Francis P. Hajek, Esquire
Richard N. Shapiro, Esquire
John M. Cooper, Esquire
* *Counsel of Record*
WILSON, HAJEK & SHAPIRO, P.C.
1294 Diamond Springs Road
Post Office Box 5369
Virginia Beach, Virginia 23471
(757) 460-7776
Counsel for Petitioner